

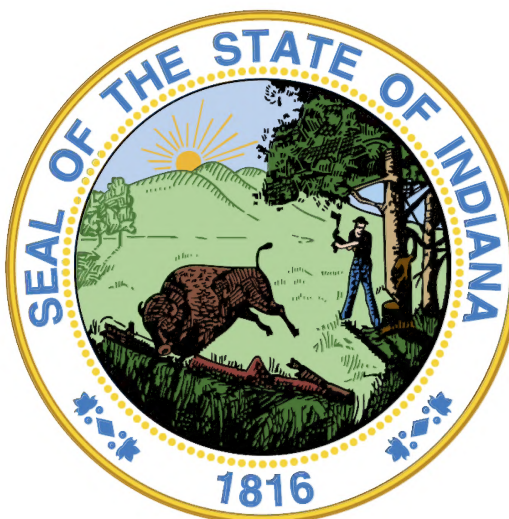
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Chief Justice Roberts

Georgia, et. al., Petitioners v. Public.Resource.Org, Inc.

590 U.S. \_\_\_, 140 S. Ct. 1498, 206 L. Ed. 2d 732



## INDIANA PATTERN JURY INSTRUCTIONS

*Criminal, Volume 1*

Third Edition, 2019

Indiana Judges Association



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
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MATTHEW  BENDER



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# **CHAPTER 1**

## **PRELIMINARY INSTRUCTIONS**

**(effective for crimes committed June 30,  
2014 or before)**

### **SYNOPSIS**

- Instruction No. 1.01. Duty of Jurors.**
- Instruction No. 1.03. Law and Facts.**
- Instruction No. 1.05. Instructions Considered as a Whole.**
- Instruction No. 1.07. The Charge.**
- Instruction No. 1.09. The Crime Definition.**
- Instruction No. 1.11. Charge Not Evidence and Plea.**
- Instruction No. 1.13. Presumption of Innocence.**
- Instruction No. 1.15. Burden of Proof—Reasonable Doubt.**
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- Instruction No. 1.21. Recalling Evidence.**
- Instruction No. 1.22. Juror Questions and Procedure.**
- Instruction No. 1.23. Multiple Defendants—Separate Consideration.**
- Instruction No. 1.25. Conduct of Trial.**
- Instruction No. 1.27. Personal Knowledge of a Juror.**



**Instruction No. 1.01. Duty of Jurors.**

You have been selected as jurors and you are bound by your oath to try this case fairly and honestly.

You are permitted to discuss the evidence among yourselves in the jury room during recesses from trial but only when all jurors and alternates are present. You must not talk or communicate about this case with anyone else. You should keep an open mind. You should not form or express any conclusion or judgment about the outcome of the case until the Court submits the case to you for your deliberations.

You must focus your attention on the court proceedings and reach a verdict solely upon what you see and hear in this court. As jurors, you must not do any independent investigation about the case and you must not be influenced in any way by information, opinions, or publicity outside the courtroom. Until you have returned your verdict in court and I have released you from your service, do not talk to any of the parties, their lawyers, any witnesses, or members of the media. If anyone tries to talk about the case in your presence, you should tell the bailiff immediately and privately. During your attendance in the courtroom, during any discussions about the case in the jury room, or during deliberations in the jury room, you shall not use any computers, laptops, cellular telephones, or other electronic communication devices unless specifically authorized by the court.

During the trial, there will be periods of time when you will be allowed to separate, such as for recesses, lunch periods, and overnight. At those times, you must not use computers, laptops, cellular telephones, or other electronic communication devices or any other method to:

- investigate, conduct research, or otherwise gather information regarding the case;
- conduct experiments or attempt to gain any specialized knowledge about the case;
- receive assistance in deciding the case from any outside sources;
- read, watch, or listen to anything about the case from any source;
- listen to discussions among or receive information from other people about the case; or
- communicate with any of the parties, their lawyers, any of the witnesses, members of the media, or anyone else about the case, including by posting information, text messaging, e-mailing, or participating in Internet chat rooms, blogs, or social websites which could contain information about the case.

You also must not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. You must also not consume any alcohol or drugs that could affect your ability to hear and understand the evidence.

The reason for these restrictions is to ensure that your decision is based only on the evidence presented during this trial and the Court's instructions on the law.



(Short form admonishment at every recess:)

During the recess, you may discuss the case among yourselves only while you are all together in the jury room. Do not discuss the case under any other circumstance. You must not form or express any opinion or conclusion about the outcome of the case until it is finally submitted to you for your deliberations.

(Long form admonishment at the conclusion of each day of trial:)

During the overnight recess, do not discuss the case under any circumstance. You must not form or express any opinion or conclusion about the outcome of the case until it is finally submitted to you for your deliberations. During the recess, you must not use computers, laptops, cellular telephones, or other electronic communication devices or any other method to:

- investigate, conduct research, or otherwise gather information regarding the case;
- conduct experiments or attempt to gain any specialized knowledge about the case;
- receive assistance in deciding the case from any outside sources;
- read, watch, or listen to anything about the case from any source;
- listen to discussions among or receive information from other people about the case; or
- communicate with any of the parties, their lawyers, any of the witnesses, members of the media, or anyone else about the case, including by posting information, text messaging, e-mailing, or participating in Internet chat rooms, blogs, or social websites which could contain information about the case.

### Comments

Jury Rule 20 provides that the trial judge shall instruct the jurors they are not to use “computers, laptops, cellular telephones, or other electronic devices while in attendance at trial, during discussions, or during deliberations, unless specifically authorized by the court.” This gives the trial judge discretion whether to exclude such devices completely from the courtroom or to allow their possession for limited purposes, such as cellphone calling during recesses under the supervision of the bailiff. If the trial judge decides to allow jurors to use electronic devices at some times during the trial, the judge should clearly instruct what exactly jurors can use them for and when.



**Instruction No. 1.03. Law and Facts.**

Under the Constitution of Indiana, you have the right to determine both the law and the facts. The Court's/my instructions are your best source in determining the law.



**Instruction No. 1.05. Instructions Considered as a Whole.**

You are to consider all the instructions together. Do not single out any certain sentence or any individual point or instruction and ignore the others.



**Instruction No. 1.07. The Charge.**

In this case, the State of Indiana has charged the Defendant with [Count 1: (*insert Count 1*), Count 2: (*insert Count 2*), etc.] The charge(s) read(s) as follows:

[insert the Charge (with oath or affirmation language redacted)] .

**Comments**

If oath or affirmation language appears on the charging information, case law supports that it should be redacted before including it in jury instructions. “Inclusion of affirmation language of this type raises several potential problems, including that it gives the semblance of attribution to the trial court or to an unknown affiant, who may or may not be available for cross-examination, as to the veracity of the factual basis for the charges. This is undesirable and completely avoidable. Thus, while the pattern jury instructions do not clearly require redaction, we strongly advise it.” *Lynn v. State*, 60 N.E.3d 1135, 1139 (Ind. Ct. App. 2016), *trans. denied*.



**Instruction No. 1.09. The Crime Definition.**

[Name of offense(s)] charged [in Count I, II, etc.] is defined by law as follows:

[Quote the statute.]

Before you may convict the Defendant, the State must have proved each of the following:

*[List here elements of the charged crime].*

If the State fails to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of \_\_\_\_\_, a \_\_\_\_\_ [felony] [a misdemeanor], charged in Count \_\_\_\_\_.

**Comments**

Some editing is necessary in almost every case to exclude statutory provisions that have no application to the facts charged. Be sure to include elements of criminal intent, e.g., “knowingly” or “intentionally,” which are required by case law and are omitted in the statute. Particular attention should be paid to those statutes with sentence enhancement built in because of prior convictions. The enhancement portion *must* be bifurcated and not referred to in any way in Phase I of the trial. Refer to Chapter 15 for appropriate language in Phase II of bifurcated trials.



**Instruction No. 1.11. Charge Not Evidence and Plea.**

The charge which has been filed is the formal method of bringing the Defendant to trial. The filing of a charge or the Defendant's arrest is not to be considered by you as any evidence of guilt.

A plea of not guilty has been entered on behalf of the Defendant.



**Instruction No. 1.13. Presumption of Innocence.**

Under the law of this State, a person charged with a crime is presumed to be innocent. This presumption of innocence continues in favor of the Defendant throughout each stage of the trial. You should fit the evidence presented to the presumption that the Defendant is innocent if you can reasonably do so.

If the evidence lends itself to two reasonable interpretations, you must choose the interpretation consistent with the defendant's innocence. If there is only one reasonable interpretation, you must accept that interpretation and consider the evidence with all the other evidence in the case in making your decision.

To overcome the presumption of innocence, the State must prove the Defendant guilty of each element of the crime charged, beyond a reasonable doubt.

The Defendant is not required to present any evidence to prove his innocence or to prove or explain anything.

**Comments**

This instruction has been modified to comply with *McCowan v. State*, 27 N.E.3d 760, 762 (Ind. 2014). *McCowan* holds that the second sentence of the first paragraph must be given if requested by the defense. *Id.* The Committee believes that this sentence should always be given as a best practice and to avoid inadvertent reversible error and an issue for post-conviction relief.

*McCowan* also leaves it to the judge's discretion whether to use language equivalent to that in the second paragraph. The Committee believes that the language in the second paragraph will almost invariably apply under the three-part standard of review for tendered criminal jury instructions and recommends its use in every case.



**Instruction No. 1.15. Burden of Proof—Reasonable Doubt.**

The burden is upon the State to prove beyond a reasonable doubt that the Defendant is guilty of the crime(s) charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the Defendant's guilt. But it does not mean that a Defendant's guilt must be proved beyond all possible doubt.

A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the Defendant's guilt, after you have weighed and considered all the evidence.

A Defendant must not be convicted on suspicion or speculation. It is not enough for the State to show that the Defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The State does not have to overcome every possible doubt.

The State must prove each element of the crime(s) by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance.

If you find that there is a reasonable doubt that the Defendant is guilty of the crime(s), you must give the Defendant the benefit of that doubt and find the Defendant not guilty of the crime under consideration.

**Comment**

The instruction above incorporates the elements of the instruction approved in *Winegeart v. State*, 665 N.E.2d 893 (Ind. 1996). The briefer instruction from *Winegeart* is reproduced below for judges who prefer it:

The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you should find the Defendant guilty. If, on the other hand, you think there is a real possibility that the Defendant is not guilty, you should give the Defendant the benefit of the doubt and find the Defendant not guilty.

*Id.* at 902.



**Instruction No. 1.17. Credibility of Witnesses—Weighing Evidence.**

You are the exclusive judges of the evidence, which may be either witness testimony or exhibits. In considering the evidence, it is your duty to decide the value you give to the exhibits you receive and the testimony you hear.

In determining the value to give to a witness's testimony, some factors you may consider are:

- the witness's ability and opportunity to observe;
- the behavior of the witness while testifying;
- any interest, bias or prejudice the witness may have;
- any relationship with people involved in the case;
- the reasonableness of the testimony considering the other evidence;
- your knowledge, common sense, and life experiences.

You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

The quantity of evidence or the number of witnesses need not control your determination of the truth. You should give the greatest value to the evidence you find most convincing.

**Comments**

Revisions were made to Instruction No. 1.13 to comply with *McCowan v. State*, 27 N.E.3d 760 (Ind. 2015), which eliminated the need for the bracketed language previously found in this instruction.



**Instruction No. 1.19. Rulings of Court.**

During the trial, the Court/I may rule that certain questions may not be answered and/or that certain exhibits may not be allowed into evidence. You must not concern yourselves with the reasons for the rulings. The Court's/my rulings are strictly controlled by law.

Occasionally, the Court/I may strike evidence from the record after you have already seen or heard it. You must not consider such evidence in making your decision.

Your verdict should be based only on the evidence admitted and the instructions on the law. Nothing that [the Court says or does] [I say or do] is intended to recommend what facts or what verdict you should find.



**Instruction No. 1.21. • Recalling Evidence.**

You must decide the facts from your memory of the testimony and exhibits admitted for your consideration. You may take notes during the trial. However, do not become so involved in note taking that you fail to listen carefully and observe the witnesses as they testify.



**Instruction No. 1.22. Juror Questions and Procedure.**

During the trial you may have questions you want to ask a witness. Please do not address any questions directly to a witness, the lawyers, or your fellow jurors since there are rules as to what questions may be asked, and the answers that witnesses are allowed to give. Instead, if you have questions, please raise your hand after the attorneys have asked all of their questions, and before the witness has left the witness stand. You must put your questions in writing. I will review them with the attorneys, and I will determine whether your questions are permitted by law. If a question is permitted, I will ask it of the witness. If it is not permitted, you may not speculate why it was not asked, nor what the answer may have been.

**Comments**

Indiana Jury Rule 20(a)(7) mandates a preliminary instruction to jurors that they “may seek to ask questions of the witnesses by submission of questions in writing.”

This instruction and Civil Pattern Instruction 1.12 are identical. A uniform instruction on juror questions was suggested by members of both the Civil and the Criminal Instructions Committees and by the Judicial Conference’s Jury Committee, as well. The Instruction above was approved by both the Criminal and the Civil Committees.

The Criminal Instructions Committee endorses the instruction above, but at the same time the Committee encourages judges and counsel to look for ways to improve upon it. Innovative approaches to juror question instructions are appropriate. As an encouragement for innovation, the Committee has reproduced the following instruction, with its incorporated juror question form, both of which has been well-received in one county:

**PRELIMINARY INSTRUCTION NO. \_\_\_\_\_**

Counsel will be given an opportunity to question all witnesses. When counsel have finished questioning the witnesses, if you feel there are substantial questions that should be asked, you will be given an opportunity to do so prior to that witness being excused.

The way we handle juror questions is to require you to write out the question on the question form and sign legibly at the bottom. The Bailiff or a member of the court staff will retrieve the question and provide it to counsel to review and give to me. This method gives counsel for both sides and me the opportunity to review the questions before they are asked since your questions, like questions of counsel, are subject to objection. I will ask the questions on your behalf if deemed appropriate.

There are a couple of matters for you to consider concerning questions. First, you cannot attempt to help either side. Second, counsel are trained attorneys and have spent much time preparing for this case. They know more about the case and the witnesses than we do. Very often they do not ask what may appear to us to be an obvious question because they are aware that a particular witness has no knowledge on that subject or the question may be objectionable, and they already know that. Third, Rules



of Evidence control what can and cannot be received into evidence. As I indicated, questions of the witnesses are subject to objection, so an objection may be made to your question and the court may sustain that objection. Therefore, your question, while submitted, may not be answered. During the trial, when I sustain an objection disregard the question and answer. If I overrule an objection, you may consider both the question and the answer.

STATE OF INDIANA

COUNTY OF

IN THE COURT

CAUSE NO.

I. My question(s) is/are directed to (name of Witness).

II. My question(s) is/are:

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Last Name of Juror Juror #

III. Objections? Plaintiff/State: ☐ No ☐ Yes, basis:

Defense: ☐ No ☐ Yes, basis:

COURT'S RULING:



**Instruction No. 1.23. Multiple Defendants—Separate Consideration.**

You should give separate consideration to each Defendant. Each Defendant is entitled to have his case decided on the evidence and the law that applies to him.

If any evidence is limited to [one Defendant] [some Defendants] you must not consider it in deciding the case of any other Defendant[s].



**Instruction No. 1.25. Conduct of Trial.**

The trial of this case will proceed as follows:

First, the attorneys will have an opportunity to make opening statements. These statements are not evidence and should be considered only as a preview of what the attorneys expect the evidence will be.

Following the opening statements, witnesses will be called to testify. They will be placed under oath and questioned by the attorneys [and/or the jury/you]. Exhibits may also be received as evidence. If an exhibit is given to you to examine, you should examine it carefully, individually, and without comment.

When the evidence is completed, the attorneys may make final arguments. These final arguments are not evidence. The attorneys are permitted to characterize the evidence, discuss the law and attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.

Finally, just before you begin your deliberations, I will give you further instructions on the law.



**Instruction No. 1.27. Personal Knowledge of a Juror.**

If, at any time, you realize you know something about the case or know a witness or the Defendant, you must inform the bailiff privately at your earliest opportunity.



## **CHAPTER 2**

# **GENERAL OFFENSES (effective for crimes committed June 30, 2014 or before)**

### **SYNOPSIS**

**Instruction No. 2.01.** Attempted [for Attempted Murder, use Instruction No. 201(a) instead.]

**Instruction No. 2.01(a).** Attempted Murder.

**Instruction No. 2.02.** Attempt—Included Offense [for Attempted Murder use Instruction No. 202(a) instead].

**Instruction No. 2.02(a).** Attempted Murder—Included Offense.

**Instruction No. 2.02(b).** Attempted Sex Crime Against a Child—Substantial Step of Travelling.

**Instruction No. 2.05.** Attempt—Misapprehension Is No Defense.

**Instruction No. 2.07.** Conspiracy.

**Instruction No. 2.09.** Conspiracy—No Defense.

**Instruction No. 2.11.** Aiding, Inducing or Causing an Offense. [For Aiding, Inducing, or Causing Attempted Murder, use Instruction No. 2.11(a) instead.]

**Instruction No. 2.11(a).** Aiding, Inducing or Causing Attempted Murder.



**Instruction No. 2.01. Attempted \_\_\_\_\_ [for Attempted Murder, use Instruction No. 201(a) instead.]**

**I.C. 35-41-5-1(a), [Statute for object crime].**

The crime of [name object crime] is defined by statute as [insert definition of object crime]. A person attempts to commit a [name object crime] when, acting with the culpability required for commission of the [name object crime], [he] [she] engages in conduct that constitutes a substantial step toward commission of the [name object crime]. The crime of attempted [name object crime] is a Class [insert grade] [felony] [misdemeanor].

Before you may convict the Defendant of attempted [name object crime], the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. acting with the culpability required to commit the crime of [name object crime], which is defined as:  
     [insert elements of object crime: i.e., knowingly or intentionally  
     element  
     element  
     element]
3. did [set out conduct alleged in charge as substantial step]
4. which the jury finds was conduct constituting a substantial step toward the commission of the crime of [name object crime].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of the crime of attempted [insert crime attempted], a Class [insert class of crime] [felony] [misdemeanor], charged in Count \_\_\_\_\_.

**Comments**

The essential elements of the object crime *must* be set out in an attempt instruction. *Smith v. State*, 459 N.E.2d 355 (Ind. 1984).

Any crime other than murder can be attempted with either the “knowingly” or the “intentionally” mental state. *Richeson v. State*, 704 N.E.2d 1008 (Ind. 1998).

It is for the jury to decide, as a matter of law, whether a “substantial step” has occurred for purposes of prosecuting an attempt crime. *Washington v. State*, 517 N.E.2d 77, 79 (Ind. 1987).



**Instruction No. 2.01(a). Attempted Murder.****I.C. 35-41-5-1(a), I.C. 35-42-1-1.**

The crime of attempted murder is defined as follows: A person attempts to commit a murder when, acting with the specific intent to kill another person, he engages in conduct that constitutes a substantial step toward killing that person.

Before you may convict the Defendant of attempted murder, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. acting with the specific intent to kill [*name victim*]
3. did [*set out conduct charged as substantial step*]
4. which was conduct constituting a substantial step toward the commission of the intended crime of killing [*name victim*].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of the crime of attempted murder, a felony, charged in Count \_\_\_\_\_.

**Comments**

For an attempted murder charge, the jury *must* be instructed on the element of the specific intent to kill:

“[A] jury instruction purporting to set out the elements of attempted murder ‘must inform the jury that the State must prove beyond a reasonable doubt that the defendant, with intent to kill the victim, engaged in conduct which was a substantial step toward such killing.’ ”

*Richeson v. State*, 704 N.E.2d 1008, 1009 (Ind. 1998), *quoting Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991); *see also Smith v. State*, 459 N.E.2d 355, 358 (Ind. 1984) (“An instruction which correctly sets forth the elements of attempted murder requires an explanation that the act must have been done with the specific intent to kill.”).

Under the *Spradlin* rule the crime of attempted murder cannot be committed “knowingly.” While *Richeson* held the *Spradlin* rule does not apply to attempts to commit other crimes, it retained *Spradlin* for attempted murder.

“[C]onfusion and needless appeals could be avoided if courts would use the phrase “specific intent” or “acting with intent to kill a human being . . . .” . . . . *Clay v. State*, 766 N.E.2d 33, 37, n.7 (Ind. Ct. App. 2002).



**Instruction No. 2.02. Attempt—Included Offense [for Attempted Murder use Instruction No. 2.02(a) instead].**

**I.C. 35-41-5-1(a), [statute for object crime].**

The crime of [name object crime] charged in this case includes the crime of attempted [name object crime]. The crime of attempted [name object crime] is defined by statute as follows: The crime of [name object crime] is defined as [insert definition of object crime]. A person attempts to commit a [name object crime] when, acting with the culpability required for commission of the [name object crime], [he] [she] engages in conduct that constitutes a substantial step toward commission of the [name object crime]. The crime of attempted [name object crime] is a Class [insert grade] [felony] [misdemeanor].

To convict the Defendant of attempted [name object crime], the State must have proved each of the following elements:

1. The Defendant
2. acting [intentionally] [knowingly] [set out conduct elements of object crime as charged]
3. did [set out conduct charged as substantial step]
4. which the jury finds was conduct constituting a substantial step toward the commission of the crime of [name object crime].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of the crime of attempted [insert crime attempted], a class [insert class of crime] [felony] [misdemeanor], charged in Count \_\_\_\_\_.

**Comments**

An attempt is an included offense of the object crime. I.C. 35-41-1-16(2).

The essential elements of the object crime *must* be set out in an attempt instruction. *Smith v. State*, 459 N.E.2d 355 (Ind. 1984).

Crimes other than murder can be attempted with either the “knowingly” or “intentionally” mental state. *Richeson v. State*, 704 N.E.2d 1008, 1010–11 (Ind. 1998).

The language, “which the jury finds,” in Element No. 4 is a specific effort to advise that the jury is to determine if the conduct alleged to be a substantial step has been proven beyond a reasonable doubt to actually be a substantial step toward the commission of the object crime.

The trial court should not indicate in its instructions that a certain set of facts satisfies the definition or requirement of a “substantial step.” See *Keller v. State*, 47 N.E.3d 1205, 1208 (Ind. 2016) (“The challenged final instruction [was error because it] amplified the statutory definition of dwelling by telling the jury that the definition would be satisfied by a specific set of facts not identified by the statute.”); *Washington v. State*, 517 N.E.2d 77, 79 (Ind. 1987) (“Whether a ‘substantial step’ has occurred, for purposes of prosecuting an attempt crime, is a question of fact to be decided by the jury



based on the particular circumstances of each case.”)

**Instruction No. 2.02(a). Attempted Murder—Included Offense.****I.C. 35-41-5-1(a), I.C. 35-42-1-1.**

The crime of murder charged in this case includes the crime of attempted murder. The crime of attempted murder is defined as follows: a person attempts to commit a murder when, acting with the specific intent to kill another person, he engages in conduct that constitutes a substantial step toward killing that person.

To convict the Defendant of attempted murder, the State must have proved each of the following elements:

1. The Defendant
2. acting with the specific intent to kill [*name victim*]
3. did [*set out conduct charged as substantial step*]
4. which was conduct constituting a substantial step toward the commission of the intended crime of killing [*name victim*].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of the crime of attempted murder, a felon, charged in Count \_\_\_\_\_.

**Comments**

An attempt is an included offense of the object crime. I.C. 35-41-1-16(2).

“[A] jury instruction purporting to set out the elements of attempted murder ‘must inform the jury that the State must prove beyond a reasonable doubt that the defendant, with intent to kill the victim, engaged in conduct which was a substantial step toward such killing.’ ” *Richeson v. State*, 704 N.E.2d 1008, 1009 (Ind. 1998), quoting *Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991). Under the *Spradlin* rule the crime of attempted murder cannot be committed “knowingly.”

“[C]onfusion and needless appeals could be avoided if courts would use the phrase “specific intent” or “acting with intent to kill a human being . . . .” *Clay v. State*, 766 N.E.2d 33, 37, n.7 (Ind. Ct. App. 2002).



**Instruction No. 2.02(b). Attempted Sex Crime Against a Child—Substantial Step of Travelling.**

**I.C. 35-41-5-1(c).**

The crime of *[name object sex crime]* is defined by statute as *[insert definition of object sex crime]*. A person attempts to commit a *[name object sex crime]* when, acting with the culpability required for commission of the *[name object sex crime]*, [he] [she] engages in conduct that constitutes a substantial step toward commission of the *[name object crime]*. A person engages in conduct that constitutes a substantial step toward commission of the crime of *[name object sex crime]* if the person, with the intent to commit *[name object sex crime]* [against a child] [an individual the person believes to be a child]:

- (1) communicates with the child or individual the person believes to be a child concerning the sex crime; and
- (2) travels to another location to meet the child or individual the person believes to be a child].

The crime of attempted *[name object crime]* is a Class *[insert grade]* [felony] [misdemeanor].

Before you may convict the Defendant of attempted *[name object sex crime]*, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. acting with *[the culpability required to commit the crime of [name object sex crime]]*, which is defined as:

*[insert elements of object crime: i.e., knowingly or intentionally*  
*element*  
*element*  
*element]*

3. did *[set out conduct alleged in charge as substantial step]*, which the jury finds was conduct constituting a substantial step toward the commission of the crime of *[name object crime]*

[or]

*(if alleged)* with the intent to commit *(name object sex crime)* against *[name child]* [an individual the Defendant believed to be a child], did

communicate with *[name the child]* [the individual the Defendant believed to be a child] concerning the *(name object sex crime)*

and

travelled to another location, *(name location alleged)*, to meet *[name the child]* [an individual the person believes to be a child].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of the crime of attempted [insert sex crime attempted], a Class [insert class of crime] [felony] [misdemeanor], charged in Count \_\_\_\_\_.

### Comments

The essential elements of the object crime *must* be set out in an attempt instruction. *Smith v. State*, 459 N.E.2d 355 (Ind. 1984).

It is for the jury to decide whether the conduct alleged to be the “substantial step” constitutes a substantial step toward the commission of the object crime beyond a reasonable doubt. *Washington v. State*, 517 N.E.2d 77, 79 (Ind. 1987) (“Whether a ‘substantial step’ has occurred, for purposes of prosecuting an attempt crime, is a question of fact to be decided by the jury based on the particular circumstances of each case.”).



**Instruction No. 2.05. Attempt—Misapprehension Is No Defense.****I.C. 35-41-5-1(b).**

It is not a defense that, because the Defendant [did not correctly understand] [misunderstood] [misapprehended] the circumstances, it would have been impossible for the Defendant to commit the crime attempted.

**Instruction No. 2.07. Conspiracy.****I.C. 35-41-5-2(a), (b).**

The crime of conspiracy is defined by statute as follows:

A person conspires to commit a felony when, with intent to commit the felony, he agrees with another person to commit the felony. [A conspiracy to commit a felony is a felony of the same class as the underlying felony.] [A conspiracy to commit murder is a Class A felony.] The State must allege and prove that either the person or the person with whom he agreed performed an overt act in furtherance of the agreement.

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. agreed with another person [*name*] to commit the crime of [*name crime*]
3. with the intent to commit the crime, and
4. [Defendant] [the other person (*name*)] performed an overt act in furtherance of the agreement by [set out the overt act(s) charged in the information].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of the crime of conspiracy, a Class [*insert the correct class of crime*] felony, charged in Count \_\_\_\_\_.

**Comments**

The word "person" is defined by law. See I.C.35-31.5-2-234; Instruction No. 14.153.



**Instruction No. 2.09. Conspiracy—No Defense.****I.C. 35-41-5-2(a).**

The law provides that it is no defense that the person with whom the accused person is alleged to have conspired:

[has not been prosecuted]

[or]

[has not been convicted]

[or]

[has been acquitted]

[or]

[has been convicted of a different crime]

[or]

[cannot be prosecuted for any reason]

[or]

[lacked the capacity to commit the crime.]

**Instruction No. 2.11. Aiding, Inducing or Causing an Offense.**  
**[For Aiding, Inducing, or Causing Attempted Murder, use Instruction No. 2.11(a) instead.]**

**I.C. 35-41-2-4.**

Aiding, inducing or causing [*name offense*] is defined by statute as follows:

A person who, knowingly or intentionally [aids] [induces] [causes] another person to commit an offense commits that offense.

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [aided]  
     [or]  
     [induced]  
     [or]  
     [caused]
4. [*name other person*] to commit the offense of [*name offense*], defined as [*define elements of offense*].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of aiding, inducing, or causing [*name offense*], a Class [*specify grade of felony*] felony, charged in Count \_\_\_\_\_.

Before you may convict the Defendant of this crime, you must find there is evidence of the Defendant's affirmative conduct, either in the form of acts or words, from which an inference of a common design or purpose may be reasonably drawn. The Defendant's conduct must have been voluntary and in concert with the other person.

The Defendant's mere presence at the scene of the crime, or mere acquiescence in the commission of the crime, is insufficient to convict for aiding, inducing, or causing the crime charged in Count \_\_\_\_\_.

(A person may be convicted of \_\_\_\_\_ [aiding] \_\_\_\_\_ [inducing] \_\_\_\_\_ [causing] \_\_\_\_\_ [*name offense*] even if the other person has not been prosecuted for the \_\_\_\_\_ [*name offense*], has not been convicted of the \_\_\_\_\_ [*name offense*], or has been acquitted of the \_\_\_\_\_ [*name offense*].)



**Instruction No. 2.11(a). Aiding, Inducing or Causing Attempted Murder.****I.C. 35-41-2-4.**

Aiding, inducing or causing attempted murder is defined by statute as follows:

A person who, knowingly or intentionally [aids another person who is engaged] [induces or causes another person to engage] in conduct that constitutes a substantial step toward killing a third person, when both have the specific intent to kill the third person, commits the offense of [aiding] [inducing][causing] attempted murder. [A person may be convicted under this statute, even if the other person has not been prosecuted for the attempted murder, has not been convicted of the attempted murder, or has been acquitted of the attempted murder.]

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [or] [intentionally]
3. [aided (*name other person*) when (*name other person*) was engaged]  
[or]  
[induced or caused (*name other person*) to engage]
4. in conduct that constituted a substantial step toward killing [*name third person*]
5. and both Defendant and [name other person] acted with the specific intent to kill [*name third person*].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of aiding, inducing, or causing attempted murder, a felony, charged in Count \_\_\_\_\_.

**Comments**

As required by *Bethel v. State*, 730 N.E.2d 1242, 1246 (Ind. 2000), and *Hopkins v. State*, 759 N.E.2d 633 (Ind. 2001).

“[B]oth the level of ambiguity and the corresponding need for precise jury instructions significantly increase in a prosecution for aiding an attempted murder.” *Williams v. State*, 737 N.E.2d 734, 740 (Ind. 2000).

A trial court commits fundamental error when it fails to instruct the jury that, to find an accomplice guilty of attempted murder, the jury must find the accomplice acted with the specific intent to kill when he/she knowingly or intentionally aided, induced, or caused another person to commit attempted murder. *Id.*; see also *Rosales v. State*, 23 N.E.3d 8 (Ind. 2015).





## **CHAPTER 3**

# **OFFENSES AGAINST THE PERSON** **(effective for crimes committed June 30,** **2014 or before)**

### **SYNOPSIS**

- Instruction No. 3.01a. Murder—Killing a Human Being.**
- Instruction No. 3.01b. Murder—Felony Murder.**
- Instruction No. 3.01c. Murder—Killing a Fetus.**
- Instruction No. 3.03. Causing Suicide.**
- Instruction No. 3.04. Assisting Suicide.**
- Instruction No. 3.05. Murder with Lesser Offense of Voluntary Manslaughter.**
- Instruction No. 3.06. Voluntary Manslaughter as Principal Charge.**
- Instruction No. 3.07. Feticide.**
- Instruction No. 3.09. Involuntary Manslaughter—Death of Human or Fetus While Committing or Attempting C or D felony or A misdemeanor.**
- Instruction No. 3.10. Causation (Involuntary Manslaughter).**
- Instruction No. 3.11. Reckless Homicide.**
- Instruction No. 3.13.1. Battery (Class B Misdemeanor).**
- Instruction No. 3.13.2. Battery (Class A Misdemeanor).**
- Instruction No. 3.13.3. Battery (Class D Felony).**
- Instruction No. 3.13.4. Battery (Class C Felony).**
- Instruction No. 3.13.5. Battery (Class B Felony).**
- Instruction No. 3.13.5a. Battery on a Person Less than Fourteen (Class B Felony).**
- Instruction No. 3.13.5b. Battery—Death of Endangered Adult (Class B Felony).**
- Instruction No. 3.13.6. Battery (Class A Felony).**
- Instruction No. 3.13A. Battery by Body Waste—Law Enforcement Officer.**
- Instruction No. 3.13AA. Battery by Bodily Waste—Non-Law Enforcement Target.**
- Instruction No. 3.13AB. Malicious Mischief—Placing to Have Touched.**
- Instruction No. 3.13AC. Malicious Mischief with Food.**
- Instruction No. 3.13b. Domestic Battery.**
- Instruction No. 3.13c. Aggravated Battery.**

- Instruction No. 3.15. Criminal Recklessness (Risk).
- Instruction No. 3.15a. Criminal Recklessness (Risk).
- Instruction No. 3.15b. Criminal Recklessness (Injury).
- Instruction No. 3.19. Obstruction of Traffic.
- Instruction No. 3.21. Kidnapping.
- Instruction No. 3.25. Criminal Confinement.
- Instruction No. 3.27. Interference with Custody.
- Instruction No. 3.29. Rape.
- Instruction No. 3.31. Criminal Deviate Conduct.
- Instruction No. 3.33. Child Molesting.
- Instruction No. 3.35. Child Molesting.
- Instruction No. 3.36. Child Molesting Defenses—Belief as to Age.
- Instruction No. 3.37. Sexual Misconduct with a Minor—Class C or B Felony.
- Instruction No. 3.37a. Sexual Misconduct with a Minor—Class A Felony.
- Instruction No. 3.39. Sexual Misconduct with a Minor.
- Instruction No. 3.39a. Sexual Misconduct with a Minor—Class B Felony.
- Instruction No. 3.41. Sexual Misconduct with a Minor—Defenses.
- Instruction No. 3.42.1. Vicarious Sexual Gratification—Touching or Fondling.
- Instruction No. 3.42.2. Vicarious Sexual Gratification—Intercourse, Animals, Deviate Sexual Conduct.
- Instruction No. 3.42.3. Child Solicitation—Victim Under Fourteen.
- Instruction No. 3.42.4. Child Solicitation—Victim Fourteen to Fifteen.
- Instruction No. 3.43.1. Child Exploitation—Managing or Producing.
- Instruction No. 3.43.2. Child Exploitation—Disseminating.
- Instruction No. 3.43.3. Child Exploitation—Computer.
- Instruction No. 3.43.3A. Child Exploitation—Performance or Incident.
- Instruction No. 3.43.3B. Child Exploitation—Disseminating or Exhibiting Matter.
- Instruction No. 3.43.3C. Child Exploitation—By Computer.
- Instruction No. 3.43.4. Sexual Conduct (Child Exploitation and Child Pornography only).
- Instruction No. 3.43A. Possession of Child Pornography.
- Instruction No. 3.43B. Sexting Defense to Child Exploitation—Managing or Producing, Child Exploitation—Disseminating, Child Exploitation—Computer, Possession of Child Pornography, Child Exploitation—Performance or Incident, Child Exploitation—Disseminating or Exhibiting Matter, and Child Exploitation—By Computer.
- Instruction No. 3.44. Unlawful Employment Near Children.
- Instruction No. 3.44b. Sex Offender Residency Offense.
- Instruction No. 3.45. Child Seduction—No Professional Relationship.
- Instruction No. 3.45.1. Child Seduction—Professional Relationship.
- Instruction No. 3.47. Sexual Battery.



- Instruction No. 3.48A. Failure to Warn of Dangerous Communicable Disease—I.C. 35-42-1-9.  
Class B Misdemeanor.
- Instruction No. 3.48B. Failure to Warn of Dangerous Communicable Disease—I.C. 35-42-1-9.  
Class D Felony.
- Instruction No. 3.49. Robbery.
- Instruction No. 3.51. Carjacking.
- Instruction No. 3.53. Overpass Mischief.
- Instruction No. 3.55. Promotion of Human Trafficking.
- Instruction No. 3.57. Sexual Trafficking of a Minor.
- Instruction No. 3.59. Human Trafficking.
- Instruction No. 3.60. Promotion of Human Trafficking of a Minor.
- Instruction No. 3.61. Sex Offender Internet Offense.

**Instruction No. 3.01a. Murder—Killing a Human Being.****I.C. 35-42-1-1.**

The crime of murder is defined by law as follows:

A person who knowingly or intentionally kills another human being commits murder, a felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. killed
4. (name).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of murder, a felony, charged in Count \_\_\_\_\_.

**Comments**

The term “human being” is defined by law. *See* I.C. 35-31.5-2-160; Instruction No. 14.115.



**Instruction No. 3.01b. Murder—Felony Murder.****I.C. 35-42-1-1.**

The crime of murder is defined by law as follows:

A person who kills another human being while committing or attempting to commit (arson) (burglary) (child molesting) (consumer product tampering) (criminal deviate conduct) (kidnapping) (rape) (robbery) (carjacking) (dealing in or manufacturing cocaine, a narcotic drug, or methamphetamine) (dealing in a Schedule I, II, III, IV, or V controlled substance) commits murder, a felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. killed
3. (name)
4. while committing or attempting to commit (arson) (burglary) (child molesting) (consumer product tampering) (criminal deviate conduct) (kidnapping) (rape) (robbery) (carjacking) (dealing in or manufacturing cocaine, a narcotic drug) (dealing in or manufacturing methamphetamine) (dealing in a Schedule I, II, III, IV, or V controlled substance), which is defined as *(set out elements of crime committed or of the attempt to commit the crime)*.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of murder, a felony, charged in Count \_\_\_\_\_.

**Comments**

The essential elements of the object crime in felony murder must be set out in the instruction. *See Smith v. State* (1984), 459 N.E.2d 355.

**Instruction No. 3.01c. Murder—Killing a Fetus.****I.C. 35-42-1-1.**

The crime of murder is defined by law as follows:

A person who knowingly or intentionally kills a fetus that has attained viability commits murder, a felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. killed
4. a fetus that had attained viability

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of murder, a felony, charged in Count \_\_\_\_\_.

**Comments**

No Indiana criminal case has attempted to define, for purposes of homicide statutes, when a fetus is considered as having attained viability. It was said in a child wrongful death case by the Indiana Supreme Court that, for purposes of wrongful death:

The “viability” standard is the predominant rule, followed by over thirty states. [Citation omitted.] A fetus is viable when it is “so far formed and developed that if then born it would be capable of living.” *Thibert v. Milka*, 419 Mass. 693, 646 N.E.2d 1025, 1025 n.3 (Mass. 1995) (citations omitted).

*Bolin v. Wingert*, 764 N.E.2d 201, 205 n. 5 (Ind. 2002).



**Instruction No. 3.03. Causing Suicide.****I.C. 35-41-1-2.**

The crime of causing suicide is defined by law as follows:

A person who intentionally causes another human being, by force, duress, or deception, to commit suicide commits causing suicide, a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. intentionally
3. caused      [name]     , a human being,
4. to commit suicide by      [force]           [duress]           [deception]      .

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of causing suicide, a Class B felony, charged in Count                     .

**Instruction No. 3.04. Assisting Suicide.****I.C. 35-42-1-2.5.**

The crime of assisting suicide is defined by law as follows:

A person who has knowledge that another person intends to   [commit]   [attempt to commit] suicide and who [intentionally provides the physical means by which the other person (attempts) (commits) suicide] [participates in a physical act by which the other person (attempts) (commits) suicide] commits assisting suicide, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. had knowledge that   [name]   intended [to commit] [to attempt to commit] suicide and
3. the Defendant intentionally
4. [provided the physical means (*describe as charged*) by which (*name*) (attempted to commit) (committed) suicide]

[or]

[participated in a physical act (*describe as charged*) by which (*name*) (attempted to commit) (committed) suicide].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of assisting suicide, a Class C felony, charged in Count \_\_\_\_\_.



**Instruction No. 3.05. Murder with Lesser Offense of Voluntary Manslaughter.**  
**I.C. 35-42-1-1, I.C. 35-42-1-3.**

The crime of murder is defined by law as follows:

A person who knowingly or intentionally kills another human being, commits murder, a felony.

Included in the charge in this case is the crime of voluntary manslaughter, which is defined by statute as follows:

A person who knowingly or intentionally kills [another human being] [a fetus that has attained viability] while acting under sudden heat commits voluntary manslaughter, a Class B felony.

[The offense is a Class A felony if it is committed by means of a deadly weapon.]

Sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. The State has the burden of proving beyond a reasonable doubt that the Defendant was not acting under sudden heat.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. killed
4. [name human being] [a fetus that had attained viability]
5. and the Defendant was not acting under sudden heat
6. [(for Class A felony) and the Defendant killed by means of a deadly weapon.]

If the State failed to prove each of elements 1 through 4 beyond a reasonable doubt, you must find the Defendant not guilty of murder as charged in Count \_\_\_\_\_.

[For A felony only: If the State did prove each of elements 1 through 4 and element 6 beyond a reasonable doubt, but the State failed to prove beyond a reasonable doubt element 5, you may find the Defendant guilty of voluntary manslaughter, a Class A felony, a lesser included offense of Count \_\_\_\_\_.]

[For A felony only: If the State did prove each of elements 1 through 4 beyond a reasonable doubt, but the State failed to prove beyond a reasonable doubt elements 5 and 6, you may find the Defendant guilty of voluntary manslaughter, a Class B felony, a lesser included offense of Count \_\_\_\_\_.]

If the State did prove each of elements 1 through 4 beyond a reasonable doubt, but the State failed to prove beyond a reasonable doubt element 5, you may find the Defendant guilty of voluntary manslaughter, a Class B felony, a lesser included offense of Count \_\_\_\_\_.

If the State did prove each of elements 1 through 5 beyond a reasonable doubt, you may find the Defendant guilty of murder, a felony as charged in Count \_\_\_\_\_.

**Comments**

The term “sudden heat” is defined. See Instruction No. 14.199.

The terms “deadly weapon” and “human being” are defined by law. *See* IC 35-41-1-8 and 35-31.5-2-160; Instruction Nos. 14.49 and 14.115.

No Indiana Criminal case has defined, for purposes of homicide statutes, when a fetus is considered as having attained viability. It was said in a child wrongful death case by the Indiana Supreme Court that, for purposes of wrongful death:

The “viability” standard is the predominant rule, followed by over thirty states. [Citation omitted.] A fetus is viable when it is “so far formed and developed that if then born it would be capable of living.” *Thibert v. Milka*, 419 Mass. 693, 646 N.E.2d 1025, 1025 n.3 (Mass. 1995) (citations omitted).

*Bolin v. Wingert*, 764 N.E.2d 201, 205 n.5 (Ind. 2002).



**Instruction No. 3.06. Voluntary Manslaughter as Principal Charge.****I.C. 35-42-1-3.**

The crime of voluntary manslaughter is defined by law as follows:

A person who knowingly or intentionally kills another [human being] [a fetus that has attained viability] while acting under sudden heat commits voluntary manslaughter, a Class B felony.

[The offense is a Class A felony if it is committed by means of a deadly weapon.]

The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. In addition to the elements below, which the State must prove beyond a reasonable doubt, for the defendant to be found guilty the killing must have also been committed under sudden heat. Evidence of sudden heat may be found in either the State's evidence or the Defendant's. But to convict for voluntary manslaughter, there must be *some* evidence of sudden heat.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. killed
4.       [name]       [a fetus that has attained viability]
5. [(for Class A felony by means of a deadly weapon.)]

[For B felony: If the State failed to prove each of elements 1 through 4 beyond a reasonable doubt, you must find the the Defendant not guilty of voluntary manslaughter, a Class B felony, charged in Count \_\_\_\_\_.]

[For A felony: If the State failed to prove elements 1 through 5 beyond a reasonable doubt, you must find the Defendant not guilty of voluntary manslaughter, a Class A felony, charged in Count \_\_\_\_\_.]

If the State did prove each of elements 1 through 4 beyond a reasonable doubt, but failed to prove element 5 beyond a reasonable doubt, you may find the Defendant guilty of voluntary manslaughter, a Class B felony, a lesser included offense of Count \_\_\_\_\_.]

**Comments**

The term "deadly weapon" is defined by law. *See* Instruction No. 14.49.

Under *Brantley v. State*, 91 N.E.3d 566 (Ind. 2018), when voluntary manslaughter is prosecuted as a stand-alone charge, "sudden heat" is a mitigating factor and not an element of the offense. *Brantley* further states there must be *some* evidence of "sudden heat" for a defendant to be found guilty of voluntary manslaughter. Evidence of "sudden heat" may be found in either the State's case or the defendant's case. *Jackson v. State*, 709 N.E.2d 326, 328 (Ind. 1999). Murder and voluntary manslaughter both require a knowing killing; whether culpability is

mitigated by sudden heat is best left for the fact-finder to determine. *Brantley*, 91 N.E.3d at 571 n.1.

No Indiana Criminal case has attempted to define, for purposes of homicide statutes, when a fetus is considered as having attained viability. It was said in a child wrongful death case by the Indiana Supreme Court that, for purposes of wrongful death:

The “viability” standard is the predominant rule, followed by over thirty states. [Citation omitted.] A fetus is viable when it is “so far formed and developed that if then born it would be capable of living.” *Thibert v. Milka*, 419 Mass. 693, 646 N.E.2d 1025, 1025 n.3 (Mass. 1995) (citations omitted).

*Bolin v. Wingert*, 764 N.E.2d 201, 205 n. 5 (Ind. 2002).



**Instruction No. 3.07. Feticide.****I.C. 35-42-1-6.**

The crime of feticide is defined as follows:

A person who knowingly or intentionally terminates a human pregnancy with an intention other than to [produce a live birth] [remove a dead fetus] commits feticide, a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. terminated the pregnancy of [name]
4. with an intention other than  
[to produce a live birth]  
[or]  
[to remove a dead fetus.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of feticide, a Class B felony, as charged in Count \_\_\_\_\_.

**Instruction No. 3.09. Involuntary Manslaughter—Death of Human or Fetus While Committing or Attempting C or D felony or A misdemeanor.**

**I.C. 35-42-1-4.**

The crime of involuntary manslaughter is defined by statute as follows:

A person who kills [another human being] [a fetus] while committing or attempting to commit [a Class C or Class D felony that inherently poses a risk of serious bodily injury] [a Class A misdemeanor that inherently poses a risk of serious bodily injury] [battery] [(for fetus only) a violation of IC 9-30-5-1 through IC 9-30-5-5 (operating a vehicle while intoxicated)] commits involuntary manslaughter, a Class C felony.

[However, if the killing results from the operation of a vehicle, the offense is a Class D felony.]

Before you may convict the Defendant, the State must have proved each of the following elements:

1. The Defendant

2. killed

(name), a human being

[or]

a fetus

3. while [committing] [attempting to commit]

4. [(set out elements of the Class C felony, Class D felony, or

Class A misdemeanor), a Class (C felony) (D felony) (A misdemeanor) which inherently poses a risk of serious bodily injury]

[or]

[(set out elements of battery), a battery]

[or]

[(for fetus only) a violation of IC 9-30-5-1 through IC 9-30-5-5 (operating a vehicle while intoxicated)].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of involuntary manslaughter, a Class C felony.

If the State did prove each of these elements beyond a reasonable doubt, you may find the Defendant guilty of involuntary manslaughter, a Class C felony.

[If the State did prove each of these elements beyond a reasonable doubt, and you find the death of [name] [the fetus] resulted from the operation of a vehicle, you may find the Defendant guilty of involuntary manslaughter, a Class D felony.]

**Comments**

The terms “fetus” and “serious bodily injury” are defined by law. See Instruction Nos. 14.86.05 and 14.185.



Proximate cause is often an issue in these cases. See Instruction No. 3.10.

The Committee notes that it has yet to be expressly decided whether it is an issue of law or fact that the crime committed or attempted “inherently posed a risk of serious bodily injury.” The Committee has cautiously treated the question as one of fact to be resolved by the jury. *But see Fought v. State*, 468 N.E.2d 247 (Ind. Ct. App. 1984) (suggests issue is one of law).

**Instruction No. 3.10. Causation (Involuntary Manslaughter).**

In a prosecution of involuntary manslaughter, the State must prove beyond a reasonable doubt that the defendant committed an act, or failed to do an act, where the law imposes a duty to act, which was the proximate cause of the death of [name].

**Comments**

“Proximate cause” and “cause of death” are defined. *See* Instruction Nos. 14.166 and 14.16.



**Instruction No. 3.11. Reckless Homicide.****I.C. 35-42-1-5.**

The crime of reckless homicide is defined by law as follows:

A person who recklessly kills another human being commits reckless homicide, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. recklessly
3. killed
4.     [name]    .

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of reckless homicide, a Class C felony, charged in count \_\_\_\_\_.

**Comments**

The term "human being" is defined by law. *See* I.C. 35-31.5-2-160; Instruction No. 14.115.

**Instruction No. 3.13.1. Battery (Class B Misdemeanor).****I.C. 35-42-2-1.**

The crime of battery is defined by statute as follows:

A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. touched     [name]
4. in a rude, insolent, or angry manner.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery, a Class B misdemeanor, charged in Count \_\_\_\_\_.



**Instruction No. 3.13.2. Battery (Class A Misdemeanor).****I.C. 35-42-2-1.**

The crime of battery is defined by statute as follows:

A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner which:

[results in bodily injury to any other person]

[is committed against a law enforcement officer or against a person summoned and directed by the officer while the officer is engaged in the execution of his official duty]

[is committed against an employee of a penal facility or a juvenile detention facility while the employee is engaged in the execution of the employee's official duty]

[is committed against a firefighter while the firefighter is engaged in the execution of the firefighter's official duty]

commits battery, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. touched [name]
4. in a rude, insolent, or angry manner
5. which:

[resulted in bodily injury to (name).]

[or]

[was committed against (name) a law enforcement officer, or against (name), a person summoned and directed by the officer while the officer was engaged in the execution of his official duty.]

[or]

[was committed against (name), an employee of (name facility), (a penal facility) (a juvenile detention facility), while (name) was engaged in the execution of (name's) official duty.]

[or]

[was committed against (name), a firefighter while the firefighter was engaged in the execution of the firefighter's official duty.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery, a Class A misdemeanor, charged in Count \_\_\_\_\_.

**Comments**

The terms "bodily injury," "deadly weapon," "endangered adult," "health care

provider,” and “penal facility” are defined by law. *See* Instruction Nos. 14.13, 14.49, 14.77, 14.106, and 14.149.

The term “law enforcement officer” is defined by law, I.C. 35-41-1-17 and Instruction No. 14.123, but in an appropriate case the definition must be modified to incorporate I.C. 35-42-2-1’s provision that “[f]or purposes of this section, a law enforcement officer includes an alcoholic beverage enforcement officer.”



**Instruction No. 3.13.3. Battery (Class D Felony).****I.C. 35-42-2-1.**

The crime of battery is defined by statute as follows:

A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner which results in bodily injury to

[a law enforcement officer or a person summoned and directed by a law enforcement officer while the officer is engaged in the execution of his official duty]

[a person less than fourteen (14) years of age and is committed by a person at least eighteen (18) years of age]

[a person of any age who is mentally or physically disabled and is committed by a person having the care of the mentally or physically disabled person, whether the care is assumed voluntarily or because of a legal obligation]

[an endangered adult (as defined by I.C. 35-46-1-1)]

[an employee of the Department of Correction while the employee is engaged in the execution of the employee's official duty]

[an employee of a school corporation while engaged in the execution of the employee's official duty]

[a (probation officer) (parole officer) (community corrections worker) (home detention officer) while the (probation officer) (parole officer) (community corrections worker) (home detention officer) was engaged in the execution of the (probation officer's) (parole officer's) (community corrections worker's) (home detention officer's) official duty]

[a person who is a health care provider while the health care provider was engaged in the execution of the health care provider's official duty]

[an employee of a penal facility or a juvenile detention facility while the employee is engaged in the execution of the employee's official duty]

[a firefighter while the firefighter is engaged in the execution of the firefighter's official duty]

[a community policing volunteer (while the volunteer is performing the duties described in IC 35-31.5-2-49) (because the person is a community policing volunteer)]

[a family or household member (as defined in IC 35-31.5-2-128) if the person who committed the offense is at least eighteen (18) years of age and committed the offense in the physical presence of a child less than sixteen (16) years of age, knowing that the child was present and might be able to see or hear the offense]

[a department of child services employee while the employee is engaged in the execution of the employee's official duty]

commits Battery, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

**[Next Page is 3-27]**



1. The Defendant
2. knowingly or intentionally
3. touched     [name]
4. in a rude, insolent, or angry manner
5. which resulted in bodily injury to

[(name), a law enforcement officer or (name), a person summoned and directed by the officer while the officer was engaged in the execution of (his) (her) official duty]

[or]

[(name), a person less than fourteen (14) years of age and was committed when the Defendant was at least eighteen (18) years of age]

[or]

[(name), who was mentally or physically disabled, when the Defendant had the care of (name), whether the care was assumed voluntarily or because of a legal obligation]

[or]

[(name), an endangered adult]

[or]

[(name), an employee of the Department of Correction while (name) was engaged in the execution of (his) (her) official duty]

[or]

[(name), an employee of (name school corporation), a school corporation while (name) was engaged in the execution of (name's) official duty]

[or]

[(name), a (probation officer) (parole officer) (community corrections worker) (home detention officer), while (name) was engaged the execution of (name's) official duty]

[or]

[(name), a health care provider while (name) was engaged the execution of (name's) official duty]

[or]

[(name), an employee of (name facility), (a penal facility) (a juvenile detention facility), while (name) was engaged in the execution of the (name's) official duty]

[or]

[(name), a firefighter, while (name) was engaged in the execution of (name)'s official duty].

[or]

[(name), a community policing volunteer, (while [(name) was performing the duties described in IC 35-31.5-2-49) (because [(name) was a community policing volunteer)]

[or]

[(name), who was a family or household member (as defined in IC 35-31.5-2-128) of Defendant's, when Defendant was at least eighteen (18) years of age and committed the offense in the physical presence of (name), who was a child less than sixteen (16) years of age, when Defendant knew that (name child) was present and might be able to see or hear the offense]

[or]

[(name), who was a department of child services employee engaged in the execution of (name's) official duty].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery, a Class D felony, charged in Count \_\_\_\_\_.

### Comments

The terms "bodily injury," "deadly weapon," "endangered adult," "family or household member," "health care provider," and "penal facility" are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-8, I.C. 35-46-1-1, I.C. 35-31.5-2-128, I.C. 4-28-5-2, I.C. 16-18-2-163, and I.C. 35-35-41-1-21; Instruction Nos. 14.13, 14.49, 14.77, 14.83b, 14.106, and 14.149.

The term "law enforcement officer" is defined by law, I.C. 35-41-1-17 and Instruction No. 14.123, but in an appropriate case the definition must be modified to incorporate I.C. 35-42-2-1's provision that "[f]or purposes of this section, a law enforcement officer includes an alcoholic beverage enforcement officer."

(Text continued on page 3-29)



**Instruction No. 3.13.4. Battery (Class C Felony).****I.C. 35-42-2-1.**

The crime of battery is defined by statute as follows:

A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner which:

[results in serious bodily injury to any other person]

[is committed by means of a deadly weapon]

[results in serious bodily injury to an endangered adult]

commits battery, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. touched [name]
4. in a rude, insolent, or angry manner
5. [which resulted in serious bodily injury to [name].]

[or]

[and the touching was committed by means of a deadly weapon.]

[or]

[which resulted in serious bodily injury to [name], who was an endangered adult.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery, a Class C felony, charged in Count

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**Comments**

The terms “deadly weapon,” “endangered adult,” and “serious bodily injury” are defined by law. See I.C. 35-41-1-8, I.C. 12-10-3-2(b), and I.C. 35-41-1-25; Instruction Nos. 14.49, 14.77a, and 14.185.

(Text continued on page 3-31)





**Instruction No. 3.13.5. Battery (Class B Felony).**

**I.C. 35-42-2-1.**

The crime of battery is defined by statute as follows:

A person at least eighteen (18) years of age who knowingly or intentionally touches another person less than fourteen (14) years of age in a rude, insolent, or angry manner which results in serious bodily injury to a person commits battery, a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when at least eighteen (18) years of age
3. knowingly or intentionally
4. touched [name]
5. in a rude, insolent, or angry manner
6. when [name] was less than fourteen (14) years of age
7. and the touching resulted in serious bodily injury to [name].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery, a Class B felony, charged in Count \_\_\_\_\_.

**Comments**

The term "serious bodily injury" is defined by law. See I.C. 35-41-1-25; Instruction No. 14.185.



**Instruction 3.13.5a. Battery on a Person Less than Fourteen (Class B Felony)**

**I.C. 35-42-2-1.**

The crime of battery is defined by statute as follows:

A person at least eighteen (18) years of age who knowingly or intentionally touches another person less than fourteen (14) years of age in a rude, insolent, or angry manner which results in serious bodily injury to a person commits battery, a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when at least eighteen (18) years of age
3. knowingly or intentionally
4. touched [name]
5. in a rude, insolent, or angry manner
6. when [name] was less than fourteen (14) years of age
7. and the touching resulted in serious bodily injury to [name].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery, a Class B felony, charged in Count .

**Comments**

The term "serious bodily injury" is defined by law. See I.C. 35-41-1-25; Instruction No. 14.185.



**Instruction 3.13.5b. Battery -Death of Endangered Adult (Class B Felony)****I.C. 35-42-2-1.**

The crime of battery is defined by statute as follows:

A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner which results in the death of an endangered adult commits battery, a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. touched [name]
4. in a rude, insolent, or angry manner
5. and the touching resulted in the death of [name], who was an endangered adult.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery, a Class B felony, charged in Count \_\_\_\_.

**Comments**

The term "endangered adult" is defined by law. See I.C. 12-10-3-2(b); Instruction No. 14.77a.

*(Text continued on page 3-33)*



**Instruction No. 3.13.6. Battery (Class A Felony).****I.C. 35-42-2-1.**

The crime of battery is defined by statute as follows:

A person at least eighteen (18) years of age who knowingly or intentionally touches another person less than fourteen (14) years of age in a rude, insolent, or angry manner which results in the death of the person touched commits battery, a Class A felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when at least eighteen (18) years of age
3. knowingly or intentionally
4. touched [name]
5. in a rude, insolent, or angry manner
6. when [name] was less than fourteen (14) years of age
7. and the touching resulted in the death of [name].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery, a Class A felony, charged in Count \_\_\_\_\_.

**Instruction No. 3.13A. Battery by Body Waste — Law Enforcement Officer.**  
**I.C. 35-42-2-6.**

The crime of battery by body waste is defined by law as follows:

A person who knowingly or intentionally in a rude, insolent, or angry manner places blood or another body fluid or waste on a [law enforcement officer] [firefighter] [first responder] [corrections officer] identified as such and while engaged in the performance of official duties or coerces another person to place blood or another body fluid or waste on the [law enforcement officer] [firefighter] [first responder] [corrections officer] commits battery by body waste, a Class D felony.

[The offense is a Class C felony if the person knew or recklessly failed to know that the blood, bodily fluid, or waste was infected with (hepatitis B) (hepatitis C) (HIV) (tuberculosis).]

[The offense is a Class B felony if the person knew or recklessly failed to know that the blood, bodily fluid, or waste was infected with (hepatitis B) (hepatitis C) (tuberculosis) and the offense results in the transmission of (hepatitis B) (hepatitis C) (tuberculosis) to the other person].

[The offense is a Class A felony if the person knew or recklessly failed to know that the blood, bodily fluid, or waste was infected with HIV and the offense results in the transmission of HIV to the other person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [placed in a rude, insolent, or angry manner]
- [or]
- [coerced (*name other person*) to place]
4. [blood] [*name other bodily fluid or waste*]
5. on [*name officer*] , when [*name officer*] was a [law enforcement officer] [firefighter] [first responder] [corrections] officer and was engaged in the performance of [his][her] official duties,
- [6. and the Defendant
- (knew)
- (recklessly failed to know)
- the (blood) (*name other bodily fluid or waste*) was infected with (hepatitis B) (hepatitis C) (HIV) (tuberculosis)]
- [7. and the placing of the (blood) (*name other bodily fluid or waste*) resulted in the transmission of (hepatitis B) (hepatitis C) (tuberculosis) to (*name officer*),



when (*name officer*) was a (law enforcement) (corrections) officer and was engaged in the performance of (his) (her) official duties.]

OR

- [7. and the placing of the (blood) (*name other bodily fluid or waste*) resulted in the transmission of (HIV) to (*name officer*), when (*name officer*) was a (law enforcement) (corrections) officer and was engaged in the performance of (his) (her) official duties.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery by body waste, a Class D/C/B/A felony, charged in Count \_\_\_\_\_.

### Comments

The terms "corrections officer," "firefighter," "first responder," "HIV," and "law enforcement officer" are defined by law. See I.C. 35-42-2-6, I.C. 35-41-1-17(a); Instruction Nos. 14.32a, 14.88, 14.88d, 14.100, and 14.123.

**Instruction No. 3.13AA. Battery by Bodily Waste — Non-Law Enforcement Target.**

**I.C. 35-42-2-6.**

A person who knowingly or intentionally in a rude, an insolent, or an angry manner places human blood, semen, urine, or fecal waste on another person commits battery by body waste, a Class A misdemeanor.

[The offense is a Class D felony if the person knew or recklessly failed to know that the blood, semen, urine, or fecal waste was infected with (hepatitis B) (hepatitis C) (HIV) (tuberculosis).]

[The offense is a Class C felony if the person knew or recklessly failed to know that the blood, semen, urine, or fecal waste was infected with (hepatitis B) (hepatitis C) (tuberculosis) and the offense results in the transmission of (hepatitis B) (hepatitis C) (tuberculosis).]

[The offense is a Class B felony if the person knew or recklessly failed to know that the blood, semen, urine, or fecal waste was infected with HIV and the offense results in the transmission of HIV to the other person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. in a rude, insolent, or angry manner
4. placed (human blood) (semen) (urine) (fecal waste)
5. on (*name person*), another person
6. and the Defendant (knew) (recklessly failed to know) that the (human blood) (semen) (urine) (fecal waste) was infected with (hepatitis B) (hepatitis C) (HIV) (tuberculosis)]
7. and the placing of the (human blood) (semen) (urine) (fecal waste) on (*name person*) resulted in the transmission of (hepatitis B) (hepatitis C) (tuberculosis) to (*name person*).

**OR**

7. and the placing of the (human blood) (semen) (urine) (fecal waste) on (*name person*) resulted in the transmission of HIV to (*name person*).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery by body waste, a Class D/C/B felony, charged in Count \_\_\_\_\_.

**Comments**

The term "HIV" is defined by law. See I.C. 35-42-2-6; Instruction No. 14.100.

**[Next Page is 3-39]**



**Instruction No. 3.13AB. Malicious Mischief — Placing to Have Touched.**

**I.C. 35-45-16-2.**

A person who recklessly, knowingly, or intentionally places human blood, semen, urine, or fecal waste in a location with the intent that another person will involuntarily touch the blood, semen, urine, or fecal waste commits malicious mischief, a Class B misdemeanor.

[The offense is is a Class D felony if the person knew or recklessly failed to know that the blood, urine, or waste was infected with hepatitis B, HIV, or tuberculosis.]

[The offense is a Class C felony if:

(the person knew or recklessly failed to know that the blood, semen, urine, or fecal waste was infected with hepatitis B and the offense results in the transmission of hepatitis B to the other person)

(the person knew or recklessly failed to know that the blood, semen, urine, or fecal waste was infected with tuberculosis and the offense results in the transmission of tuberculosis to the other person).]

[The offense is a Class B felony if the person knew or recklessly failed to know that the waste was infected with HIV and the offense results in the transmission of HIV to the other person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. recklessly, knowingly, or intentionally
3. placed (human blood) (semen) (urine) (fecal waste) in ( *specify location*)
4. with the intent that another person would involuntarily touch the (blood) (semen) (urine) (fecal waste)
5. (*for Class D felony*) and the Defendant (knew) (recklessly failed to know) that the (blood) (semen) (urine) (fecal waste) was infected with (hepatitis B) (HIV) (tuberculosis)]
6. (*for Class C felony*) and the Defendant (knew) (recklessly failed to know) that the (blood) (semen) (urine) (fecal waste) was infected with (hepatitis B) (tuberculosis) and the offense resulted in the transmission of (hepatitis B) (tuberculosis) to the other person]
7. (*for Class B felony*) and the Defendant (knew) (recklessly failed to know) that the (blood) (semen) (urine) (fecal waste) was infected with HIV and the offense resulted in the transmission of HIV to the other person].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of malicious mischief, a Class B misdemeanor/Class D/C/B felony, charged in Count \_\_\_\_\_.

**Comments**

The term "HIV" is defined by law. See I.C. 35-42-2-6; Instruction No. 14.100.



**Instruction No. 3.13AC. Malicious Mischief With Food.****I.C. 35-45-16-2.**

A person who recklessly, knowingly, or intentionally places human blood, bodily fluid, or fecal waste in a location with the intent that another person will ingest the blood, body fluid, or fecal waste, commits malicious mischief with food, a Class A misdemeanor.

[The offense is a Class D felony if the person knew or recklessly failed to know that the blood, body fluid, or fecal waste was infected with hepatitis B, HIV, or tuberculosis.]

[The offense is a Class C felony if:

(the person knew or recklessly failed to know that the blood, semen, urine, or fecal waste was infected with hepatitis B and the offense results in the transmission of hepatitis B to the other person)

(the person knew or recklessly failed to know that the blood, semen, urine, or fecal waste was infected with tuberculosis and the offense results in the transmission of tuberculosis to the other person).]

[The offense is a Class B felony if the person knew or recklessly failed to know that the waste was infected with HIV and the offense results in the transmission of HIV to the other person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. recklessly, knowingly, or intentionally
3. placed (human blood) (semen) (urine) (fecal waste) in ( *specify location*)
4. with the intent that another person would ingest the (blood) (semen) (urine) (fecal waste)
5. (for Class D felony) (and the Defendant [knew] [recklessly failed to know] that the [blood] [semen] [urine] [fecal waste] was infected with [hepatitis B] [HIV] [tuberculosis].]

(or)

(for Class B felony) (and the Defendant [knew] [recklessly failed to know] that the [blood] [semen] [urine] [fecal waste] was infected with [hepatitis B] [HIV] [tuberculosis] and the offense resulted in the transmission of [hepatitis B] [HIV] to the other person.)

(or)

(for Class C felony) (and the Defendant [knew] [recklessly failed to know] that the [blood] [semen] [urine] [fecal waste] was infected with HIV and the offense resulted in the transmission of HIV to the other person.)]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of malicious mischief, a Class A misdemeanor/Class D/C/B felony, charged in Count \_\_\_\_\_.

**Comments**

The term "HIV" is defined by law. See I.C. 35-42-2-6; Instruction No. 14.100.



**Instruction No. 3.13b. Domestic Battery.****I.C. 35-42-2-1.3.**

The crime of domestic battery is defined by law as follows:

A person who knowingly or intentionally touches a person who (is or was a spouse of the other person), (is or was living as if a spouse of the other person\*), or (has a child in common with the other person) in a rude, insolent, or angry manner that results in bodily injury to the person touched commits domestic battery, a Class A misdemeanor. [If the person committed the offense in the physical presence of a child less than sixteen (16) years of age, knowing that the child was present and might be able to see or hear the offense, the offense is a Class D felony.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. touched (name person allegedly touched)
4. in a rude, insolent, or angry manner
5. which resulted in bodily injury to (name person allegedly touched)
6. when (*name person allegedly touched*):
  - (was Defendant's spouse);
  - (had been Defendant's spouse);
  - (was living as if Defendant's spouse\* based on the following factors:
    - the duration of the relationship;
    - the frequency of contact;
    - the financial interdependence;
    - whether the two (2) individuals were raising children together;
    - whether the two (2) individuals had engaged in tasks directed toward maintaining a common household; and
    - other factors the jury considers relevant)

(had once lived as if Defendant's spouse\* based on the following factors:

the duration of the relationship;

the frequency of contact;

the financial interdependence;

whether the two (2) individuals were raising children together;

whether the two (2) individuals had engaged in tasks directed toward maintaining a common household; and

other factors the jury considers relevant)

(had a child in common with Defendant). [and]

[7: Defendant committed the offense

in the physical presence of (*name child*), who was at the time less than sixteen (16) years of age,

and when Defendant knew that (*name child*) was present and might be able to hear or see the offense].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of domestic battery, a Class A misdemeanor/Class D felony, charged in Count

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## Comments

\*The "living as if a spouse" element was held to be unconstitutionally vague in *Vaughn v. State*, 782 N.E.2d 417 (Ind. Ct. App.), *transfer denied*, 792 N.E.2d 43 (Ind. 2003). Subsequent decisions consider *Vaughn* to have decided that the statute was vague as applied, and as also holding that evidence that Vaughn and his victim had "previously lived together and had an intimate relationship" was insufficient to prove they had lived "as if spouses." *Davis v. State*, 796 N.E.2d 798 (Ind. Ct. App. 2003); *Williams v. State*, 798 N.E.2d 457 (Ind. Ct. App. 2003). *Davis* also notes the amendment of the domestic battery statute in 2003 to add the factors listed in the instruction for consideration in deciding whether there was an "as if a spouse" relationship. The Committee notes that it is an unresolved question whether the factors added by the 2003 legislation are enough to avoid the vagueness holding in *Vaughn*. Judges are encouraged to check for recent decisions on this issue.



Domestic battery is a Class D felony if Defendant is alleged to have committed the Class A misdemeanor when Defendant had a previous unrelated conviction under I.C. 35-42-2-1.3 or I.C. 35-42-2-1(a) (2) before its repeal, or when Defendant had a prior conviction in any other jurisdiction (including a military court) in which the elements of the crime for which the conviction was entered are substantially similar to the elements described in I.C. 35-42-2-1.3. Trial of D felony domestic battery based on such a prior conviction must be bifurcated. *See* Chapter 15, Instruction No. 15.43a.

**Instruction No. 3.13c. Aggravated Battery.****I.C. 35-42-2-1.5.**

The crime of aggravated battery is defined by law as follows:

A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death or causes (serious permanent disfigurement) (protracted loss or impairment of the function of a bodily member or organ) (the loss of a fetus) commits aggravated battery, a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. inflicted injury on (*name person*)
4. and the injury

(created a substantial risk of death)

(caused:

[serious permanent disfigurement]

[protracted loss or impairment of the function of (*specify alleged bodily member or organ*)]

[the loss of a fetus].)

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of aggravated battery, a Class B felony.



**Instruction No. 3.15. Criminal Recklessness (Risk).**

I.C. 35-42-2-2.

I.C. 9-13-2-1.7.

I.C. 9-21-8-55.

The crime of criminal recklessness is defined by law as follows:

A person who recklessly, knowingly, or intentionally (performs an act that creates a substantial risk of bodily injury to another person) (performs hazing) commits criminal recklessness, a Class B misdemeanor.

[The offense is a Class A misdemeanor if the conduct includes the use of a vehicle.]

[The offense is a Class D felony if it is committed while armed with a deadly weapon.]

[The offense is a Class D felony if the Defendant committed aggressive driving that resulted in serious bodily injury to another person.]

[The offense is a Class C felony if it is committed by shooting a firearm into an inhabited dwelling or other building or place where people are likely to gather.]

[The offense is a Class C felony if the Defendant committed aggressive driving that resulted in the death of another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. recklessly, knowingly, or intentionally;
3. performed

[an act that created a substantial risk of bodily injury to (*name other person*)]

[or]

[hazing];

- [4. and

(*for a Class A misdemeanor*) the [act] [hazing] included the use of a vehicle)

(or)

(*for a Class D felony*) (Defendant performed the [act]

[hazing] while armed with a deadly weapon)

(or)

(*for a Class C felony*) (the [act] [hazing] was committed by shooting a firearm into an inhabited dwelling or other building or place where people

were likely to gather)

[or]

[4. and the Defendant committed aggressive driving by

(a) (knowingly) (intentionally) committing at least three of the following:

- (1) Following a vehicle too closely in violation of I.C. 9-21-8-14;
- (2) Unsafe operation of a vehicle in violation of I.C. 9-21-8-24;
- (3) Overtaking another vehicle on the right by driving off the roadway in violation of I.C. 9-21-8-6;
- (4) Unsafe stopping or slowing a vehicle in violation of I.C. 9-21-8-26;
- (5) Unnecessary sounding of the horn in violation of I.C. 9-19-5-2;
- (6) Failure to yield in violation of I.C. 9-21-8-29 through I.C. 9-21-8-34;
- (7) Failure to obey a traffic control device in violation of I.C. 9-21-8-41;
- (8) Driving at an unsafe speed in violation of I.C. 9-21-5;
- (9) Repeatedly flashing the vehicle's headlights;

(b) during one (1) episode of continuous driving of a vehicle

(c) with the intent to harass or intimidate (*name person*), a person in another vehicle

5. and the aggressive driving resulted in {(for a Class D felony) serious bodily injury to} {(for a Class C felony) the death of}(*name person*), another person.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of criminal recklessness, a Class B/A misdemeanor/Class D/C felony, charged in Count \_\_\_\_\_.

### Comments

The terms “deadly weapon,” “firearm,” “hazing,” and “serious bodily injury” are defined by law. See I.C. 35-41-1-8, I.C. 35-47-1-5, I.C. 35-42-2-2, or I.C. 35-41-1-25; Instruction Nos. 14.49, 14.87, 14.105, and 14.185.

It appears that it may not be necessary to instruct the jury on the meaning of negligence, even though such an instruction is requested by the defense in a criminal recklessness trial in which the defendant has asserted his conduct was negligent only, not reckless. In such situations, “[n]egligence . . . is an argument not a defense” and “is simply a statement that the State failed to prove [Defendant] was reckless.” *Springer v. State*, No. 31D01-9911-CF-955 (Ind., Nov. 6, 2003) (holding that trial judge properly refused to instruct on negligence). The



same decision summarily affirmed the holding of the Court of Appeals that an instruction on accident was not required.

While the *Springer* decision suggests that negligence instructions may generally be unnecessary in criminal reckless prosecutions, if the trial court concludes that such an instruction is appropriate, the Committee recommends use of the following instruction, incorporating both “recklessly” and “negligently,” the latter based on Civil Pattern Instruction No. 5.01.

#### **Recklessly and Negligent—Definitions**

A person engages in conduct “recklessly” if he/she engages in the conduct in plain, conscious, and unjustified disregard of the harm that might result therefrom, and the disregard involves a substantial deviation from acceptable standards of conduct. This requires the State to prove more than mere negligence on the part of the Defendant. Negligence is the failure to do what a reasonably careful and prudent person would do under the same or similar circumstances or the doing of something that a reasonably careful and prudent person would not do under the same or similar circumstances. In other words, negligence is the failure to exercise reasonable or ordinary care.

**Instruction No. 3.15a. Criminal Recklessness (Risk).****I.C. 35-42-2-2.**

The crime of criminal recklessness is defined by law as follows:

A person who recklessly, knowingly, or intentionally (performs an act that creates a substantial risk of bodily injury to another person) (performs hazing) commits criminal recklessness, a Class B misdemeanor.

[The offense is a Class A misdemeanor if the conduct includes the use of a vehicle.]

[The offense is a Class D felony if it is committed while armed with a deadly weapon.]

[The offense is a Class C felony if it is committed by shooting a firearm into an inhabited dwelling or other building or place where people are likely to gather.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. recklessly, knowingly or intentionally
3. performed

[an act that created a substantial risk of bodily injury to (*name other person*)]

[or]

[hazing]

- [4. and

(*for Class A misdemeanor*) (the [act] [hazing] included the use of a vehicle)

(or)

(*for Class D felony*) (Defendant performed the [act] [hazing] while armed with a deadly weapon)

(or)

(*for Class C felony*) (the [act] [hazing] was committed by shooting a firearm into an inhabited dwelling or other building or place where people were likely to gather).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal recklessness, a Class B/A Misdemeanor/ Class D/C felony, charged in Count \_\_\_\_\_.

(Text continued on page 3-47)



**Comments**

The terms “deadly weapon,” “firearm,” “hazing” and “serious bodily injury” are defined by law. See I.C. 35-41-1-8, I.C. 35-47-1-5, I.C. 35-42-2-2, or I.C. 35-41-1-25; Instruction Nos. 14.49, 14.87, 14.105 and 14.185.

It appears that it may not be necessary to instruct the jury on the meaning of negligence, even though such an instruction is requested by the defense in a criminal recklessness trial in which the defendant has asserted his conduct was negligent only, not reckless. In such situations, “[n]egligence . . . is an argument not a defense” and “is simply a statement that the State failed to prove [Defendant] was reckless.” *Springer v. State*, No. 31D01-9911-CF-955 (Ind., Nov. 6, 2003) (holding that trial judge properly refused to instruct on negligence). The same decision summarily affirmed the holding of the Court of Appeals that an instruction on accident was not required.

While the *Springer* decision suggests that negligence instructions may generally be unnecessary in criminal reckless prosecutions, if the trial court concludes that such an instruction is appropriate, the Committee recommends use of the following instruction incorporating both “recklessly” and “negligently,” the latter based on Civil Pattern Instruction No. 5.01:

**Recklessly and Negligent — Definitions**

A person engages in conduct “recklessly” if he/she engages in the conduct in plain, conscious and unjustified disregard of the harm that might result therefrom, and the disregard involves a substantial deviation from acceptable standards of conduct. This requires the State to prove more than mere negligence on the part of the Defendant. Negligence is the failure to do what a reasonably careful and prudent person would do under the same or similar circumstances or the doing of something that a reasonably careful and prudent person would not do under the same or similar circumstances. In other words, negligence is the failure to exercise reasonable or ordinary care.

**Instruction No. 3.15b. Criminal Recklessness (Injury).****I.C. 35-42-2-2.**

The crime of criminal recklessness defined by law as follows:

A person who recklessly, knowingly, or intentionally inflicts serious bodily injury on another person or performs hazing that results in serious bodily injury to a person commits criminal recklessness, a Class D felony.

[The offense is a Class C felony if committed by means of a deadly weapon.]

Before you may convict the Defendant, the State must must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. recklessly, knowingly, or intentionally
3. [inflicted serious bodily injury on (name)]  
and [or]  
[performed hazing that resulted in serious bodily injury to (name)]
4. and the offense was committed by means of a deadly weapon.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal recklessness, a Class D/C felony, charged in Count \_\_\_\_\_.



### Comments

The terms "deadly weapon," "hazing" and "serious bodily injury" are defined by law. See I.C. 35-41-1-8, I.C. 35-42-2-2, and I.C. 35-41-1-25; Instruction Nos. 14.49, 14.105 and 14.185.

It appears that it may not be necessary to instruct the jury on the meaning of negligence, even though such an instruction is requested by the defense in a criminal recklessness trial in which the defendant has asserted his conduct was negligent only, not reckless. In such situations, "[n]egligence . . . is an argument not a defense" and "is simply a statement that the State failed to prove [Defendant] was reckless." *Springer v. State*, No. 31D01-9911-CF-955 (Ind., Nov. 6, 2003) (holding that trial judge properly refused to instruct on negligence). The same decision summarily affirmed the holding of the Court of Appeals that an instruction on accident was not required.

While the *Springer* decision suggests that negligence instructions may generally be unnecessary in criminal reckless prosecutions, if the trial court concludes that such an instruction is appropriate, the Committee recommends use of the following instruction incorporating both "recklessly" and "negligently," the latter based on Civil Pattern Instruction No. 5.01:

### Recklessly and Negligent — Definitions

A person engages in conduct "recklessly" if he/she engages in the conduct in plain, conscious and unjustified disregard of the harm that might result therefrom, and the disregard involves a substantial deviation from acceptable standards of conduct. This requires the State to prove more than mere negligence on the part of the Defendant. Negligence is the failure to do what a reasonably careful and prudent person would do under the same or similar circumstances or the doing of something that a reasonably careful and prudent person would not do under the same or similar circumstances. In other words, negligence is the failure to exercise reasonable or ordinary care.

**Instruction No. 3.19. Obstruction of Traffic.****I.C. 35-42-2-4.**

The crime of obstruction of traffic is defined by law as follows:

A person who recklessly, knowingly, or intentionally obstructs vehicular or pedestrian traffic commits obstruction of traffic, a Class B misdemeanor.

[The offense is a Class A misdemeanor if it includes the use of a motor vehicle.]

[The offense is a Class D felony if it results in serious bodily injury.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. recklessly, knowingly, or intentionally
3. obstructed vehicular or pedestrian traffic
4. and the obstruction
  - (for Class A misdemeanor) (included the use of a motor vehicle)
  - (or)
  - (for Class D felony) (resulted in serious bodily injury to [name person]).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of obstruction of traffic, a Class A misdemeanor/Class D felony, charged in Count \_\_\_\_\_.



**Comments**

The terms "motor vehicle" and "serious bodily injury" are defined by law. *See* I.C. 35-41-1-18.5 and I.C. 35-41-1-25; Instruction Nos. 14.137 and 14.185.

**Instruction No. 3.21. Kidnapping.****I.C. 35-42-3-2.**

The crime of kidnapping is defined by law as follows:

A person who knowingly or intentionally (confines) (removes) another person (with intent to obtain ransom) (while hijacking a vehicle) (with intent to obtain the release, or intent to aid in the escape, of any person from lawful detention) (with intent to use the person confined as a shield or hostage) commits kidnapping, a Class A felony.

Before you may convict the Defendant, the State must must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [confined] [removed] [*name*]
4. [with the intent to obtain ransom]

[or]

[while hijacking a vehicle]

[or]

[with intent to obtain the release or to aid in the escape of (*name*) from lawful detention]

[or]

[with intent to use (*name*) as a shield or hostage.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of kidnapping, a Class A felony, charged in Count

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**Comments**

The term "lawful detention" is defined by law. *See* I.C. 35-41-1-18; Instruction No. 14.125.



**Instruction No. 3.25. Criminal Confinement.****I.C. 35-42-3-3.**

The crime of criminal confinement is defined by law as follows:

A person who knowingly or intentionally (confines another person without the other person's consent) (removes another person, by force or threat of force from one place to another) commits criminal confinement, a Class D felony.

[The offense is a Class C felony if (the other person is less than fourteen (14) years of age and is not the person's child) (it was committed by using a vehicle) (it resulted in bodily injury to a person other than the confining or removing person).]

[The offense is a Class B felony if it (is committed while armed with a deadly weapon) (results in serious bodily injury to another person).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [confined (*name*) without (his) (her) consent]

[or]

[removed (*name*) by (force) (threat of force) from one place to another]

- [4. (for Class C felony)

(when [*name person confined or removed*] was less than fourteen years of age and was not Defendant's child)

(or)

(and Defendant used a vehicle to commit [the confinement] [the removal])

(or)

[and (the confinement) (the removal) resulted in bodily injury to (*name person other than Defendant*)]

- [5. (for Class B felony)

(and Defendant committed the [confinement] [removal] while armed with a deadly weapon.)

(or)

(and the [confinement] [removal] resulted in serious bodily injury to [*name person alleged*].)]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of criminal confinement, a Class D/C/B felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "deadly weapon" and "serious bodily injury" are defined by law. *See*

I.C. 35-4-1-8 and I.C. 35-41-1-25; Instruction Nos. 14.49 and 14.185.

The statutory definition of the crime provides for criminal confinement by removing another person “by fraud” or “enticement,” in addition to “by force or threat of force.” IC 35-42-3-3(a)(2). The “fraud” and “enticement” terms were held unconstitutionally vague in *Brown v. State*, 868 N.E.2d 464 (Ind., 2007) (“[w]e therefore construe the Indiana criminal confinement statute to exclude from Section 3-3(a)(2) the phrase ‘by fraud, enticement,’ leaving it intact as to its proscription against a person who knowingly or intentionally ‘removes another person by force or threat of force’ from one place to another”). Consequently, removals “by fraud” or “enticement” have been removed from the instruction.



**Instruction No. 3.27. Interference with Custody.****I.C. 35-42-3-4(a).**

The crime of interference with custody is defined by law as follows:

A person who knowingly or intentionally removes another person who is less than eighteen (18) years of age to a place outside Indiana (when the removal violates a child custody order of a court) (and violates a child custody order of a court by failing to return the other person to Indiana) commits interference with custody, a Class D felony.

[The offense is a Class C felony if the other person is less than fourteen (14) years of age and is not the person's child.]

[The offense is a Class B felony if it (is committed while armed with a deadly weapon) (results in serious bodily injury to another person).]

Before you may convict the Defendant, the State must must have proved each of the following beyond a reasonable doubt:

1. Defendant
2. knowingly or intentionally
3. [removed (*name*) from Indiana]  
[or]  
[failed to return [*name*] to Indiana after removing (*name*) from Indiana]
4. when [*name*] was less than eighteen (18) years of age
5. and when [removing *name*] [failing to return *name*] violated an order of a court
6. (*for Class C felony*) (and when [*name*] was less than fourteen [14] years of age and was not Defendant's child)  
(or)  
(*for Class B felony*) (and when the [removal] [failure to return] occurred while Defendant was armed with a deadly weapon)  
(or)  
(*for Class B felony*) (and when the [removal] [failure to return] resulted in serious bodily injury to [*name* other person].))

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of interference with custody, a Class D/C/B felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "deadly weapon" and "serious bodily injury" are defined by law. See I.C. 35-41-1-8 and I.C. 35-41-1-25; Instruction Nos. 14.49 and 14.185.

**Instruction No. 3.29. Rape.****I.C. 35-42-4-1.**

The crime of rape is defined by law as follows:

A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when [the other person is compelled by force, or imminent threat of force] [the other person is unaware that the sexual intercourse is occurring] [the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given] commits rape, a Class B felony.

[The offense is a Class A felony if

(it is committed by using or threatening the use of deadly force)

(it is committed while armed with a deadly weapon)

(it results in serious bodily injury to any person other than the defendant)

(its commission is facilitated by furnishing the other person, without the other person's knowledge, a drug or controlled substance).

(its commission is facilitated by knowing that the other person had been furnished, without the the other person's knowledge, a drug or controlled substance).]

Before you may convict the Defendant, the State must must have proved each of the following beyond a reasonable doubt:

1. The Defendant

2. knowingly or intentionally

3. had sexual intercourse with [name] when

4. [(name) was compelled by force or imminent threat of force]

[or]

[(name) was unaware that the sexual intercourse was occurring]

[or]

(name) was so mentally disabled or deficient that consent to sexual intercourse could not be given]

[5. (for Class A felony) (and Defendant committed the sexual intercourse by [using] [threatening the use of] deadly force)

(or)

(and Defendant committed the sexual intercourse while armed with a [name weapon], a deadly weapon)

(or)

(and the Defendant's conduct resulted in serious bodily injury to [name person other than the Defendant])



(or)

(and the sexual intercourse was facilitated by furnishing [name], without [name]'s knowledge, [name drug or controlled substance alleged], a [drug] [controlled substance])

(or)

(and the sexual intercourse was facilitated by knowing that [name] had been furnished, without [name]'s knowledge, [name drug or controlled substance alleged], a [drug] [controlled substance]).

If the State failed to prove each of these elements beyond a reasonable doubt, you should find Defendant not guilty of rape, a Class B/A felony, charged in Count \_\_\_\_\_.

### Comments

The terms "controlled substance," "deadly force", "deadly weapon" "drug," "serious bodily injury" and "sexual intercourse" are defined by law. See I.C.35-48-1-9, I.C. 35-41-1-7, I.C. 35-41-1-8, I.C. 35-48-1-16, I.C. 35-41-1-25, and I.C. 35-41-1-26; Instruction Nos. 14.31, 14.47, 14.49, 14.71, 14.185 and 14.189.

**Instruction No. 3.31. Criminal Deviate Conduct.**

**I.C. 35-42-4-2.**

The crime of criminal deviate conduct is defined by law as follows:

A person who knowingly or intentionally causes another person to perform or submit to deviate sexual conduct when the other person is [compelled by force or imminent threat of force] [unaware that the conduct is occurring] [so mentally disabled or deficient that consent to the conduct cannot be given] commits deviate sexual conduct, a Class B felony.

[The offense is a Class A felony if:

(it is committed by using or threatening the use of deadly force)

(it is committed while armed with a deadly weapon)

(it results in serious bodily injury to any person other than the defendant)

(its commission is facilitated by furnishing the other person, without the other person's knowledge, a drug or a controlled substance or knowing that the other person was furnished the drug or controlled substance without the other person's knowledge).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant

2. knowingly or intentionally

3. caused [name] to perform or submit to deviate sexual conduct when

4. [(name) was compelled by force or imminent threat of force]

[or]

[(name) was unaware that the conduct was occurring]

[or]

[(name) was so mentally disabled or deficient that consent could not be given.]

[5. (for Class A felony) (and Defendant committed elements 1 through 4 by [using] [threatening the use of] deadly force.)

(or)

(and Defendant committed elements 1 through 4 while armed with a [name weapon], a deadly weapon.)

(or)

(and the Defendant's commission of elements 1 through 4 resulted in serious bodily injury to [name person other than the Defendant].)

(or)



(and the Defendant's commission of elements 1 through 4 was facilitated by furnishing [name] with [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.)

(or)

(and the Defendant's commission of elements 1 through 4 was facilitated by knowing that [name] had been furnished [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.))

If the State failed to prove each of these elements beyond a reasonable doubt, you must find Defendant not guilty of criminal deviate conduct, a Class B/A felony, charged in Count \_\_\_\_\_.

### Comments

The terms "controlled substance," "deadly force," "deadly weapon," "drug," "serious bodily injury" and "sexual intercourse" are defined by law. See I.C.35-48-1-9, I.C. 35-41-1-7, I.C. 35-41-1-8, I.C. 35-48-1-16, I.C. 35-41-1-25, and I.C. 35-41-1-26; Instruction Nos. 14.31, 14.47, 14.49, 14.71, 14.185 and 14.189.

**Instruction No. 3.33. Child Molesting.****I.C. 35-42-4-3(a).**

The crime of child molesting is defined by law as follows:

A person who, with a child under fourteen (14) years of age, performs or submits to sexual intercourse or deviate sexual conduct, commits child molesting, a Class B felony.

[The offense is a Class A felony if:

(it is committed by a person at least twenty-one years of age)

(it is committed by using or threatening the use of deadly force)

(it is committed while armed with a deadly weapon)

(it results in serious bodily injury)

(it is facilitated by furnishing the child, without the child's knowledge, a drug or a controlled substance)

(it is facilitated by knowing that the child was furnished with a drug or a controlled substance without the child's knowledge).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant

2. when [*name child*] was a child under fourteen (14) years of age

3. knowingly

(a) [performed] [submitted to]

(b) [sexual intercourse] [deviate sexual conduct]

4. (*for Class A felony*)

and when elements 1 through 3 took place the Defendant was at least twenty-one years of age)

(or)

(and elements 1 through 3 were committed by using or threatening the use of deadly force)

(or)

(and when committing elements 1 through 3 Defendant was armed with a deadly weapon)

(or)

(and commission of elements 1 through 3 resulted in serious bodily injury)

(or)

(and the Defendant's commission of elements 1 through 3 was facilitated by furnishing



[name] [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.)

(or)

(and the Defendant's commission of elements 1 through 3 was facilitated by knowing that [name] had been furnished [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.)

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child molesting, a Class B/A felony, charged in Count \_\_\_\_\_.

### Comments

The terms "controlled substance," "deadly force," "deadly weapon," "deviate sexual conduct," "drug," "serious bodily injury" and "sexual intercourse" are defined by law. See I.C. 35-48-1-9, I.C. 35-41-1-7, I.C. 35-41-1-8, I.C. 35-41-1-9, I.C. 35-48-1-16, I.C. 35-41-1-25, and I.C. 35-41-1-26; Instruction Nos. 14.31, 14.47, 14.49, 14.57, 14.71, 14.185 and 14.189.

The belief-of-age defenses for this offense are in Instruction 3.36.

The Indiana Supreme Court has said that, in the "fondling or touching" version of the child molesting offense in subsection (b) of I.C. 35-42-4-3, the mental state may be either knowingly or intentionally. *Louallen v. State*, 778 N.E.2d 794, 797 (Ind. 2002).

The Committee concludes that this culpability holding will apply here as well, to the subsection (a) "sexual intercourse or deviate sexual conduct" form of child molesting. See *D'Paffo v. State*, 778 N.E.2d 798 (Ind. Ct. App. 2002) ("well established that conviction of child molesting requires the State to prove beyond a reasonable doubt criminal intent on the part of the defendant"). For this reason, the Committee has used only "knowingly" as the appropriate element. If the State does choose to allege "intentionally," then "intentionally" should replace "knowingly." If the State chooses to allege "knowingly or intentionally," then "knowingly or intentionally" should replace "knowingly."

The express provision in I.C. 35-42-4-3(c) for a defense of reasonable belief the child was 16 or older indicates that the General Assembly did not intend for knowledge of the age of the child to be an element of the offense. This conclusion is consistent with both common law and modern statutory "strict liability" policy. See *Lechner v. State*, 715 N.E.2d 1285 (Ind. Ct. App. 1999), trans. denied, 726 N.E.2d 313. See also American Law Institute, *Model Penal Code and Commentaries* § 213.6 at 413 et seq. (1980) (Commentary to Model Penal Code's "mistake as to age" defense). Accordingly, in this instruction the age of the alleged victim is not subject to the "knowingly" culpability required for the other elements.

The Indiana Supreme Court has indicated an "intent" issue is present when a medical or health exam is asserted to have been the reason for deviate sexual conduct alleged as penetration by an object:

Where the evidence warrants an inference that an alleged penetration of the sex



organ or anus of a person by an object was in furtherance of a bona fide medical or personal hygiene-related examination or procedure, we believe that defendant would be entitled to an appropriate instruction as to criminal intent.

*D’Paffo v. State*, 778 N.E.2d 798, 802 (Ind. 2002)

D’Paffo held that there is no IC 35-42-4-3(a) element of “intent to arouse or satisfy sexual desires,” but it would seem that the Court contemplates such an element when the medical or health exam context is present. The Committee suggests in that situation to instruct the jury that it is a defense to the alleged child molesting that the penetration by an object was part of a bona fide medical or personal hygiene-related exam or procedure performed or assisted by defendant and that defendant was acting without any intent to arouse or satisfy sexual desires.

As noted in the comments above, knowledge of the age of the child is not an element of the offense. For this reason, the Committee has placed the burden to prove the mistake of age defense on the Defendant. And, as noted in the commentary to Instruction No. 3.36, the Committee believes that, under *Lechner v. State*, 715 N.E.2d 1285 (Ind. Ct. App. 1999), trans. denied, 726 N.E.2d 313, the defense applies when the defendant believes the child was fourteen (14) years of age or older. *Lechner* concluded that the provision in I.C. 35-42-4-3(c) for a defense that the defendant believed the child was sixteen (16) years or older was a “scrivener’s error,” and Instruction No. 3.36 applies that conclusion.

In general, a defendant bears the burden of proving an affirmative defense. However, if the affirmative defense specifically negates an element of the crime, then the burden of proof lies on the State to establish beyond a reasonable doubt the absence of the affirmative defense. *Ward v. State*, 438 N.E.2d 750, 753 (Ind. 1982) (citing *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).) A difference exists between facts in mitigation of culpability that are separate and distinct from the elements of the crime and an affirmative defense that negates an element of the crime. *Ward*, 438 N.E.2d at 753.

*Blatchford v. State*, 673 N.E.2d 781, 782–83 (Ind. Ct. App. 1996) (holding burden to prove statutory defense of inability to pay support was Defendant’s).

Effective July 1, 2007, a number of exceptions to the reasonable-belief-of-age-sixteen defense were adopted by the legislature. The Committee believes that the burden to prove these exceptions should be placed on the State, and that the burden of proof must be the beyond-a-reasonable-doubt standard.



**Instruction No. 3.35. Child Molesting.****I.C. 35-42-4-3(b).**

The crime of child molesting is defined by law as follows:

A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony.

[The offense is a Class A felony if:

(it is committed by using or threatening the use of deadly force)

(it is committed while armed with a deadly weapon)

(it is facilitated by furnishing the child, without the child's knowledge, a drug or a controlled substance)

(it is facilitated by knowing that the child was furnished with a drug or a controlled substance without the child's knowledge).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant

2. with the intent to arouse or satisfy the sexual desires of [name] or [name Defendant].

3. when [name] was a child under fourteen (14) years of age

4. knowingly

5. [performed] [submitted to] any fondling or touching [of] [by] [name]

6. (for Class A felony) (and elements 1 through 5 were committed by Defendant's knowingly using or threatening the use of deadly force)

(or)

(and when committing elements 1 through 5 Defendant knowingly was armed with a deadly weapon)

(or)

(and the Defendant's commission of elements 1 through 5 was facilitated by Defendant's knowingly furnishing [name] with [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.)

(or)

(and the Defendant's commission of elements 1 through 5 was facilitated by Defendant's knowing that [name] had been furnished [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.)]

If the State failed to prove each of these elements beyond a reasonable doubt, you



must find the Defendant not guilty of child molesting, a Class C/A felony, charged in Count \_\_\_\_\_.

### Comments

The terms “controlled substance,” “deadly force,” “deadly weapon,” “serious bodily injury,” and “drug” are defined by law. See I.C. 35-48-1-9, I.C. 35-41-1-7, I.C. 35-41-1-8, I.C. 35-41-1-25, and I.C. 35-48-1-16; Instruction Nos. 14.31, 14.47, 14.49, 14.185, and 14.71.

The belief-of-age defenses for this offense are in Instruction 3.36.

The Indiana Supreme Court has said that with this offense:

[T]he Legislature intended that it be unnecessary for the State to prove that the alleged fondling or touching was performed with any level of mental culpability whatsoever in order to obtain a conviction. But we and the Court of Appeals have nevertheless long held that criminal intent is an element of the offense. [Citations omitted.] And neither court has ever held that a level of mental culpability more severe than “knowing” was required in this regard.

*Louallen v. State*, 778 N.E.2d 794, n. 3 (Ind. 2002).

For this reason, the Committee has used only “knowingly” as the appropriate element. If the State does choose to allege “intentionally,” then “intentionally” should replace “knowingly.” If the State chooses to allege “knowingly or intentionally,” then “knowingly or intentionally” should replace “knowingly.”

The express provision in I.C. 35-42-4-3(c) for a defense of reasonable belief the child was 16 or older indicates that the General Assembly did not intend for knowledge of the age of the child to be an element of the offense. This conclusion is consistent with both common law and modern statutory “strict liability” policy. See *Lechner v. State*, 715 N.E.2d 1285 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 313. See also American Law Institute, *Model Penal Code and Commentaries* § 213.6 at 413 *et seq.* (1980) (Commentary to Model Penal Code’s “mistake as to age” defense). Accordingly, in this instruction the age of the alleged victim is not subject to the “knowingly” culpability required for the other elements.



**Instruction No. 3.36. Child Molesting Defenses—Belief as to Age.****I.C. 35-42-4-3.**

[It is a defense that the Defendant reasonably believed that [name child] was fourteen (14) years of age or older when the (sexual intercourse) (deviate sexual conduct) took place.

This defense does not apply, however, if

(the offense was committed by using or threatening the use of deadly force)

(or)

(the offense was committed while armed with a deadly weapon)

(or)

(the offense resulted in serious bodily injury)

(the commission of the offense was facilitated by furnishing [name child] without [name child's] knowledge with a drug or a controlled substance)

(or)

(the commission of the offense was facilitated knowing that [name child] had been furnished with a drug or a controlled substance without [name child's] knowledge).

If the Defendant proved by the greater weight of the evidence that he/she reasonably believed [name child] was fourteen (14) years of age or older and if the State failed to prove beyond a reasonable doubt that (insert exception from above), then you must find the Defendant not guilty of child molesting, a Class B/A felony, charged in Count \_\_\_\_\_ of the indictment.

**Comments**

These defenses apply to child molesting of all types. For the instructions on the basic offenses, see Instructions 3.33 and 3.35.

The court should instruct separately on the greater weight of the evidence by using Model Civil Jury Instruction No. 111:

Evidence is of the greater weight if it convinces you more strongly of its truthfulness.

It is evidence that convinces you that something is more probably true than not true.

A greater number of witnesses testifying to a fact on one side or a greater quantity of evidence introduced on one side does not necessarily amount to the greater weight of the evidence.

The Committee concludes that *Lechner v. State*, 715 N.E.2d 1285 (Ind. Ct. App. 1999), *trans. denied*, holds that the defense in I.C. 35-42-4-3(c) applies when the defendant believed the child was older than 14 years of age, a child age to which the child molesting offense does not apply. *Lechner's* following reasoning supports this conclusion:

We must conclude the legislature's failure to modify the age at which the defense becomes available to a defendant was in the nature of an oversight or scrivener's error and could not be reflective of a legislative intent to permit the defense only when the



actor believes the child is 16 or older, when the statute itself does not prohibit the activity with a child aged 14 to 16. We thus decline to limit the availability of the statutory mistake of fact defense to those defendants whose reasonable belief was that the child was at least 16 years old and hold that the defense is available to any defendant who reasonably believes the child to be of such an age *that the activity engaged in was not criminally prohibited*.

*Id.* at 1287–88 (emphasis added). See also *T.M. v. State*, 804 N.E.2d 773 (Ind. Ct. App. 2004), *trans. denied*; *Garcia v. State*, 936 N.E.2d 361, 364 (Ind. Ct. App. 2010) (“It is a defense to child molesting that the defendant believed the victim to be fourteen years of age or older.”).

As noted in the comments to Instructions 3.33 and 3.35, knowledge of the child’s age is not an element of the offense. For this reason, the Committee has placed the burden to prove the mistake of age defense on the Defendant.

In general, a defendant bears the burden of proving an affirmative defense. However, if the affirmative defense specifically negates an element of the crime, then the burden of proof lies on the State to establish beyond a reasonable doubt the absence of the affirmative defense. *Ward v. State*, 438 N.E.2d 750, 753 (Ind. 1982) (citing *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).) A difference exists between facts in mitigation of culpability that are separate and distinct from the elements of the crime and an affirmative defense that negates an element of the crime. *Ward*, 438 N.E.2d at 753.

*Blatchford v. State*, 673 N.E.2d 781, 782–83 (Ind. Ct. App. 1996) (holding burden to prove statutory defense of inability to pay support was Defendant’s).

Effective July 1, 2007, several exceptions to the reasonable-belief-of-age-sixteen defense were adopted by the legislature. The Committee believes that the burden to prove these exceptions should be placed on the State, and that the burden of proof must be the beyond-a-reasonable-doubt standard.



**Instruction No. 3.37. Sexual Misconduct with a Minor—Class C or B Felony.****I.C. 35-42-4-9(a).**

The crime of sexual misconduct with a minor is defined by law as follows:

A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to [sexual intercourse] [deviate sexual conduct] commits sexual misconduct with a minor, a Class C felony.

[The offense is a Class B felony if it is committed by a person at least twenty-one (21) years of age.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly
  - (a) [performed] [submitted to]
  - (b) [sexual intercourse] [deviate sexual conduct]
  - (c) with [name] and
3. the Defendant was at the time of the occurrence at least eighteen (18) years of age and
4. [name] was at the time of the occurrence a child, at least fourteen (14) years of age but less than sixteen (16) years of age
- [5. and at the time of the occurrence Defendant was at least twenty-one (21) years of age].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of sexual misconduct with a minor, a Class C/B felony, charged in Count \_\_\_\_\_.

**Comments**

The terms “controlled substance,” “deadly force,” “deadly weapon,” “deviate sexual conduct,” “serious bodily injury,” “sexual intercourse,” and “drug” are defined by law. See I.C. 35-48-1-9, I.C. 35-41-1-7, I.C. 35-41-1-8, I.C. 35-41-1-9, I.C. 35-41-1-25, and I.C. 35-48-1-16; Instruction Nos. 14.31, 14.47, 14.49, 14.57, 14.185, 14.189, and 14.71.

The mistake of age, prior marriage, and “Romeo and Juliet” defenses in I.C. 35-42-4-9(c), (d), and (e) apply to the offense in this instruction. If the facts warrant an instruction on these defenses, use Instruction No. 4.41.

The Indiana Supreme Court has observed that with the child molesting offense, the mental state required is either “knowingly” or “intentionally.” *Louallen v. State*, 778 N.E.2d 794, 797 (Ind. 2002).

*Louallen v. State*, 778 N.E.2d 794, 797–98 (Ind. 2002).

As with child molesting, the sexual misconduct with a minor offense is both silent as to mental culpability and has been held to have an implied mens rea. *Warren v. State*, 701 N.E.2d 902 (Ind. Ct. App. 1998). The Committee concludes that Louallen's reasoning applies to sexual misconduct with a minor as well. For this reason, the Committee has used only "knowingly" as the appropriate element. If the State does choose to allege "intentionally," then "intentionally" should replace "knowingly." If the State chooses to allege "knowingly or intentionally," then "knowingly or intentionally" should replace "knowingly."

The express provision in I.C. 35-42-4-9(c) for a defense of reasonable belief the child was 16 or older indicates that the General Assembly did not intend for knowledge of, or failure to realize, the age of the child to be an element of the offense. This conclusion is consistent with both common law and modern statutory policy. See *Lechner v. State*, 715 N.E.2d 1285 (Ind. Ct. App. 1999), trans. denied, 726 N.E.2d 313. See also American Law Institute, Model Penal Code and Commentaries § 213.6 at 413 et seq. (1980) (Commentary to Model Penal Code's "mistake as to age" defense). Accordingly, in this instruction defendant's knowledge of the age of the alleged victim is not included as an element. By the same reasoning, the provision in I.C. 35-42-4-9(d) for a defense that the child was or had been married led the Committee to conclude that knowledge the child was not married or had never been married was not intended to be an element of the offense.



**Instruction No. 3.37a. Sexual Misconduct with a Minor—Class A Felony.****I.C. 35-42-4-9(a).**

The crime of sexual misconduct with a minor is defined by law as follows:

A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to [sexual intercourse] [deviate sexual conduct] when the offense:

(is committed by using or threatening the use of deadly force)

(is committed while armed with a deadly weapon)

(is facilitated by furnishing the child, without the child's knowledge, a drug or a controlled substance)

(is facilitated by knowing that the child was furnished with a drug or a controlled substance without the child's knowledge)

commits sexual misconduct with a minor, a Class A felony, as charged in Count \_\_\_\_\_.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant

2. knowingly

(a) [performed] [submitted to]

(b) [sexual intercourse] [deviate sexual conduct]

(c) with [name] and

3. the Defendant was at the time of the occurrence at least eighteen (18) years of age

4. and [name] was at the time of the occurrence a child, at least fourteen (14) years of age but less than sixteen (16) years of age

5. (and elements 1 through 4 were committed by using or threatening the use of deadly force)

(or)

(and when committing elements 1 through 4 Defendant was armed with a deadly weapon)

(or)

(and commission of elements 1 through 4 resulted in serious bodily injury)

(or)

(and the Defendant's commission of elements 1 through 4 was facilitated by furnishing [name] [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.)



(or)

(and the Defendant's commission of elements 1 through 4 was facilitated by knowing that [name] had been furnished [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.))

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of sexual misconduct with a minor, a Class A felony, charged in Count \_\_\_\_\_.

### Comments

The terms "controlled substance," "deadly force," "deadly weapon," "deviate sexual conduct," "serious bodily injury," "sexual intercourse," and "drug" are defined by law. See I.C. 35-48-1-9, I.C. 35-41-1-7, I.C. 35-41-1-8, I.C. 35-41-1-9, I.C. 35-41-1-25, and I.C. 35-48-1-16; Instruction Nos. 14.31, 14.47, 14.49, 14.57, 14.185, 14.189, and 14.71.

The Indiana Supreme Court has observed that with the child molesting offense:

[T]he Legislature intended that it be unnecessary for the State to prove that the alleged fondling or touching was performed with any level of mental culpability whatsoever in order to obtain a conviction. But we and the Court of Appeals have nevertheless long held that criminal intent is an element of the offense. [Citations omitted.] And neither court has ever held that a level of mental culpability more severe than "knowing" was required in this regard.

*Louallen v. State*, 778 N.E.2d 794, 797-98 (Ind. 2002).

As with child molesting, the sexual misconduct with a minor offense is both silent as to mental culpability and has been held to have an implied mens rea. *Warren v. State*, 701 N.E.2d 902 (Ind. Ct. App. 1998). The Committee concludes that Louallen's reasoning applies to sexual misconduct with a minor as well. For this reason, the Committee has used only "knowingly" as the appropriate element. If the State does choose to allege "intentionally," then "intentionally" should replace "knowingly." If the State chooses to allege "knowingly or intentionally," then "knowingly or intentionally" should replace "knowingly."

The express provision in I.C. 35-42-4-9(c) for a defense of reasonable belief the child was 16 or older indicates that the General Assembly did not intend for knowledge of, or failure to realize, the age of the child to be an element of the offense. This conclusion is consistent with both common law and modern statutory policy. See *Lechner v. State*, 715 N.E.2d 1285 (Ind. Ct. App. 1999), trans. denied, 726 N.E.2d 313. See also American Law Institute, Model Penal Code and Commentaries § 213.6 at 413 et seq. (1980) (Commentary to Model Penal Code's "mistake as to age" defense). Accordingly, in this instruction defendant's knowledge of the age of the alleged victim is not included as an element. By the same reasoning, the provision in I.C. 35-42-4-9(d) for a defense that the child was or had been married led the Committee to conclude that knowledge the child was not married or had never been married was not intended to be an element of the offense.



By legislative amendment effective July 1, 2003, the defenses in I.C. 35-42-4-9(c) (reasonable belief child at least sixteen) or I.C. 35-42-4-9 (d) (child has been married) do not apply to Class A felony sexual misconduct with a minor by sexual intercourse or deviate sexual conduct. And the defense in I.C. 35-42-4-9(e), added by legislative amendment effective July 1, 2007, cannot by its terms apply to Class A felony sexual misconduct with a minor by sexual intercourse or deviate sexual conduct.

**Instruction No. 3.39. Sexual Misconduct with a Minor.****I.C. 35-42-4-9(b)(1).**

The crime of sexual misconduct with a minor is defined by law as follows:

A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to any fondling or touching, of either the child or the older person, with the intent to arouse or satisfy the sexual desires of either the child or the older person, commits sexual misconduct with a minor, a Class D felony. [The offense is a Class C felony if it is committed by a person at least twenty-one (21) years of age.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to arouse or satisfy the sexual desires of either [*name younger person*] or [*name Defendant*]
3. knowingly
  - (a) fondled or touched or was fondled or touched by
  - (b) [*name younger person*]
4. when the Defendant was at the time of the occurrence eighteen (18) years of age or older
5. when [*name younger person*] was at the time of the occurrence at least fourteen (14) years of age but less than sixteen (16) years of age
- [6. and at the time of the occurrence Defendant was at least twenty-one (21) years of age].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of sexual misconduct with a minor, a Class D/C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms “controlled substance,” “deadly force,” “deadly weapon,” “deviate sexual conduct,” “serious bodily injury,” “sexual intercourse,” and “drug” are defined by law. See I.C. 35-48-1-9, I.C. 35-41-1-7, I.C. 35-41-1-8, I.C. 35-41-1-9, I.C. 35-41-1-25, and I.C. 35-48-1-16; Instruction Nos. 14.31, 14.47, 14.49, 14.57, 14.185, 14.189, and 14.71.

The mistake of age, prior marriage, and “Romeo and Juliet” defenses in I.C. 35-42-4-9(c), (d), and (e) apply to the offense in this instruction. If the facts warrant an instruction on these defenses, use Instruction No. 3.41.

The Indiana Supreme Court has observed that with the child molesting offense: [T]he Legislature intended that it be unnecessary for the State to prove that the alleged fondling or touching was performed with any level of mental culpability



whatsoever in order to obtain a conviction. But we and the Court of Appeals have nevertheless long held that criminal intent is an element of the offense. [Citations omitted.] And neither court has ever held that a level of mental culpability more severe than “knowing” was required in this regard.

*Louallen v. State*, 778 N.E.2d 794, 797–98 (Ind. 2002).

As with child molesting, the sexual misconduct with a minor offense is both silent as to mental culpability and has been held to have an implied mens rea. *Warren v. State*, 701 N.E.2d 902 (Ind. Ct. App. 1998). The Committee concludes that *Louallen*’s reasoning applies to sexual misconduct with a minor as well. For this reason, the Committee has used only “knowingly” as the appropriate element. If the State does choose to allege “intentionally,” then “intentionally” should replace “knowingly.” If the State chooses to allege “knowingly or intentionally,” then “knowingly or intentionally” should replace “knowingly.”

The express provision in I.C. 35-42-4-9I for a defense of reasonable belief the child was 16 or older indicates that the General Assembly did not intend for knowledge of, or failure to realize, the age of the child to be an element of the offense. This conclusion is consistent with both common law and modern statutory policy. See *Lechner v. State*, 715 N.E.2d 1285 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 313. See also American Law Institute, *Model Penal Code and Commentaries* § 213.6 at 413 *et seq.* (1980) (Commentary to Model Penal Code’s “mistake as to age” defense). Accordingly, in this instruction defendant’s knowledge of the age of the alleged victim is not included as an element. By the same reasoning, the provision in I.C. 35-42-4-9(d) for a defense that the child was or had been married led the Committee to conclude that knowledge the child was not married or had never been married was not intended to be an element of the offense.

**Instruction No. 3.39a. Sexual Misconduct with a Minor—Class B Felony.****I.C. 35-42-4-9(b)(2).**

The crime of sexual misconduct with a minor is defined by law as follows:

A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to any fondling or touching, of either the child or the older person, with the intent to arouse or satisfy the sexual desires of either the child or the older person, when the offense:

(is committed by using or threatening the use of deadly force)

(is committed while armed with a deadly weapon)

(is facilitated by furnishing the child, without the child's knowledge, a drug or a controlled substance)

(is facilitated by knowing that the child was furnished with a drug or a controlled substance without the child's knowledge)

commits sexual misconduct with a minor, a Class B felony, as charged in Count \_\_\_\_\_.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to arouse or satisfy the sexual desires of either [*name younger person*] or [*name Defendant*]
3. knowingly
  - (a) fondled or touched or was fondled or touched by
  - (b) [*name younger person*]
4. when the Defendant was at the time of the occurrence eighteen (18) years of age or older
5. and when [*name younger person*] was at the time of the occurrence at least fourteen (14) years of age but less than sixteen (16) years of age
6. (and elements 1 through 5 were committed by using or threatening the use of deadly force)

(or)

(and when committing elements 1 through 5 Defendant was armed with a deadly weapon)

(or)

(and the Defendant's commission of elements 1 through 5 was facilitated by furnishing [*name*] [*name drug or controlled substance alleged*], a [drug] [controlled substance]), without [*name*]'s knowledge.)



(or)

(and the Defendant's commission of elements 1 through 5 was facilitated by knowing that [name] had been furnished [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.))

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of sexual misconduct with a minor, a Class B felony, charged in Count \_\_\_\_\_.

### Comments

The terms "controlled substance," "deadly force," "deadly weapon," "deviate sexual conduct," "serious bodily injury," "sexual intercourse," and "drug" are defined by law. See I.C. 35-48-1-9, I.C. 35-41-1-7, I.C. 35-41-1-8, I.C. 35-41-1-9, I.C. 35-41-1-25, and I.C. 35-48-1-16; Instruction Nos. 14.31, 14.47, 14.49, 14.57, 14.185, 14.189, and 14.71.

The Indiana Supreme Court has observed that with the child molesting offense:

[T]he Legislature intended that it be unnecessary for the State to prove that the alleged fondling or touching was performed with any level of mental culpability whatsoever in order to obtain a conviction. But we and the Court of Appeals have nevertheless long held that criminal intent is an element of the offense. [Citations omitted.] And neither court has ever held that a level of mental culpability more severe than "knowing" was required in this regard.

*Louallen v. State*, 778 N.E.2d 794, 797-98 (Ind. 2002).

As with child molesting, the sexual misconduct with a minor offense is both silent as to mental culpability and has been held to have an implied mens rea. *Warren v. State*, 701 N.E.2d 902 (Ind. Ct. App. 1998). The Committee concludes that *Louallen's* reasoning applies to sexual misconduct with a minor as well. For this reason, the Committee has used only "knowingly" as the appropriate element. If the State does choose to allege "intentionally," then "intentionally" should replace "knowingly." If the State chooses to allege "knowingly or intentionally," then "knowingly or intentionally" should replace "knowingly."

The express provision in I.C. 35-42-4-9I for a defense of reasonable belief the child was 16 or older indicates that the General Assembly did not intend for knowledge of, or failure to realize, the age of the child to be an element of the offense. This conclusion is consistent with both common law and modern statutory policy. See *Lechner v. State*, 715 N.E.2d 1285 (Ind. Ct. App. 1999), *trans. denied*, 726 N.E.2d 313. See also American Law Institute, *Model Penal Code and Commentaries* § 213.6 at 413 *et seq.* (1980) (Commentary to Model Penal Code's "mistake as to age" defense). Accordingly, in this instruction defendant's knowledge of the age of the alleged victim is not included as an element. By the same reasoning, the provision in I.C. 35-42-4-9(d) for a defense that the child was or had been married led the Committee to conclude that knowledge the child was not married or had never been married was not intended to be an element of the offense.

By legislative amendment effective July 1, 2003, the defenses in I.C. 35-42-4-9I (reasonable belief child at least sixteen) or I.C. 35-42-4-9 (d) (child has been married) do not apply to Class B felony sexual misconduct with a minor by fondling or touching. And the defense in I.C. 35-42-4-9(e), added by legislative amendment effective July 1, 2007, cannot by its terms apply to Class B felony sexual misconduct with a minor by fondling or touching.



**Instruction No. 3.41. Sexual Misconduct with a Minor—Defenses.****I.C. 35-42-4-9(c), (d), and (e).**

[It is a defense that the Defendant reasonably believed that [name child] was sixteen years of age or older. If the Defendant proved this by a preponderance of the evidence, you must find the Defendant not guilty of sexual misconduct with a minor, a Class C/B felony, charged in Count \_\_\_\_\_.]

[It is a defense that [name child] either was married or had been married at the time of the occurrence. If the Defendant proved this by a preponderance of the evidence, you must find the Defendant not guilty of sexual misconduct with a minor, a Class C/B felony, charged in Count \_\_\_\_\_.]

[It is a defense that:

- the Defendant was not more than four years older than the child
- and
- the relationship between the Defendant and the child was (a dating relationship) (an ongoing personal relationship, but not including a family relationship)
- and
- the Defendant was under twenty-one (21 years of age at the time of the sexual conduct
- and
- the sexual conduct
  - was not committed by using or threatening the use of deadly force
  - and
  - was not committed while armed with a deadly weapon
  - and
  - did not result in serious bodily injury
  - and
  - was not facilitated by furnishing [name child] without [name child's] knowledge with a drug or a controlled substance)
  - and
  - the commission of the offense was facilitated knowing that [name child] had been furnished with a drug or a controlled substance without [name child's] knowledge
- and
- the Defendant did not have a position of authority or substantial influence over the child.

If the Defendant proved these elements of the defense by a preponderance of the

evidence, you must find the Defendant not guilty of sexual misconduct with a minor, a Class C/B felony, charged in Count \_\_\_\_\_.]

### Comments

This instruction is for use with Class C or B felony sexual misconduct of a minor by intercourse or deviate sexual conduct, Instruction No. 3.37, or with Class D or C felony sexual misconduct of a minor by fondling or touching, Instruction 3.39. This instruction is not to be used with Class A felony sexual misconduct of a minor by intercourse or deviate sexual conduct, Instruction No. 3.37a, or with Class B felony sexual misconduct of a minor by fondling or touching, Instruction 3.39a.

As noted in the Comments to Instructions 3.37 and 3.39, knowledge of the age of the child is not an element of the offense, and unmarried status of the child is also not an element. For this reason, the Committee has placed the burden to prove these defenses on the Defendant.

In general, a defendant bears the burden of proving an affirmative defense. However, if the affirmative defense specifically negates an element of the crime, then the burden of proof lies on the State to establish beyond a reasonable doubt the absence of the affirmative defense. *Ward v. State*, 438 N.E.2d 750, 753 (Ind. 1982), (citing *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).) A difference exists between facts in mitigation of culpability that are separate and distinct from the elements of the crime and an affirmative defense that negates an element of the crime. *Ward*, 438 N.E.2d at 753.

*Blatchford v. State*, 673 N.E.2d 781, 7872-83 (Ind. Ct. App. 1996) (holding burden to prove statutory defense of inability to pay support was Defendant's).



**Instruction No. 3.42.1. Vicarious Sexual Gratification—Touching or Fondling.****I.C. 35-42-4-5.**

The crime of vicarious sexual gratification is defined by law as follows:

A person eighteen (18) years of age or older who knowingly or intentionally [directs] [aids] [induces] [causes] a child under the age of sixteen (16) to touch or fondle himself or another child under the age of sixteen (16) with the intent to arouse or satisfy the sexual desires of a child or of the older person commits vicarious sexual gratification, a Class D felony.

[The offense is a Class C felony if a child involved in the offense is under the age of fourteen (14).]

[The offense is a Class B felony if:

(it is committed by using or threatening the use of deadly force)

(it is committed while armed with a deadly weapon)

(it is facilitated by furnishing the child, without the child's knowledge, a drug or a controlled substance)

(it is facilitated by knowing that the child was furnished with a drug or a controlled substance without the child's knowledge).]

[The offense is a Class A felony if it results in serious bodily injury.]

Before you may convict the Defendant the State must have proved the following:

1. The Defendant
2. with the intent to arouse or satisfy [Defendant's] [(*name child*)'s] sexual desires
3. knowingly or intentionally
4. [directed] [aided] [induced] [caused]
5. [*name child*] to touch or fondle [himself/herself] [(*name*), another child]
6. [when (*name child directed, aided, induced, or caused*) was under the age of sixteen (16)]

[or]

[when (*name child directed, aided, induced, or caused*) and (*name child touched or fondled by first child*) both were under the age of sixteen (16)]

7. and when Defendant was eighteen (18) years of age or older
- [8. and when [*name child*], a child involved in the offense, was under the age of fourteen (14)]
- [9. (and elements 1 through 7 were committed by using or threatening the use of deadly force)

(or)

(and when committing elements 1 through 7 Defendant was armed with a deadly weapon)

(or)

(and the Defendant's commission of elements 1 through 7 was facilitated by furnishing [name] [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.)

(or)

(and the Defendant's commission of elements 1 through 7 was facilitated by knowing that [name] had been furnished [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.)]

- [10. and Defendant's commission of elements 1 through 7 resulted in serious bodily injury.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of vicarious sexual gratification, a Class D/C/B/A felony, charged in Count \_\_\_\_\_.

### Comments

The terms "deadly force," "deadly weapon" and "serious bodily injury" are defined by law. See I.C. 35-41-1-7, I.C. 35-41-1-8 and I.C. 35-41-1-25; Instruction Nos. 14.47, 14.49 and 14.185.



**Instruction No. 3.42.2. Vicarious Sexual Gratification—Intercourse, Animals Deviate, Sexual Conduct.**

**I.C. 35-42-4-5.**

The crime of vicarious sexual gratification is defined by law as follows:

A person eighteen (18) years of age or older who knowingly or intentionally directs, aids, induces, or causes a child under the age of sixteen (16) to [engage in sexual intercourse with another child under sixteen (16) years of age] [engage in sexual conduct with an animal other than a human being] [engage in deviate sexual conduct with another person] with intent to arouse or satisfy the sexual desires of a child or of the older person] commits vicarious sexual gratification, a Class C felony.

[The offense is a Class B felony if any child involved in the offense is less than fourteen (14) years of age.]

[The offense is a Class A felony if:

(it is committed by using or threatening the use of deadly force)

(it is committed while armed with a deadly weapon)

(it results in serious bodily injury)

(it is facilitated by furnishing the child, without the child's knowledge, a drug or a controlled substance)

(it is facilitated by knowing that the child was furnished with a drug or a controlled substance without the child's knowledge).]

Before you may convict the Defendant the State must have proved the following:

1. The Defendant
2. with the intent to arouse or satisfy [Defendant's] [(*name child*)'s] sexual desires
3. knowingly or intentionally
4. [directed] [aided] [induced] [caused]
5. [*name child*] to
  - [engage in sexual intercourse with (*name other child*)]
  - [or]
  - [engage in sexual conduct with a (*name animal*), an animal other than a human being]
  - [or]
  - [engage in deviate sexual conduct with (*name other person*)]
6. when (*name child directed, aided, induced, or caused*) was under the age of sixteen (16)
- [or]

[when (*name child directed, aided, induced, or caused*) and (*name child with whom first child engaged in sexual intercourse*) both were under the age of sixteen (16)]

7. and when Defendant was eighteen (18) years of age or older

[8. and when [*name child*], a child involved in the offense, was under the age of fourteen (14)]

[9. (and elements 1 through 7 were committed by using or threatening the use of deadly force)

(or)

(and when committing elements 1 through 7 Defendant was armed with a deadly weapon)

(or)

(and the commission of elements 1 through 7 resulted in serious bodily injury)

(or)

(and the Defendant's commission of elements 1 through 7 was facilitated by furnishing [*name*] [*name drug or controlled substance alleged*], a [drug] [controlled substance]), without [*name*]'s knowledge.)

(or)

(and the Defendant's commission of elements 1 through 7 was facilitated by knowing that [*name*] had been furnished [*name drug or controlled substance alleged*], a [drug] [controlled substance]), without [*name*]'s knowledge.)

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of vicarious sexual gratification, a Class C/B/A felony charged in Count \_\_\_\_\_.

### Comments

The terms “deadly force,” “deadly weapon,” “deviate sexual conduct,” “serious bodily injury,” and “sexual intercourse” are defined by law. See I.C. 35-41-1-7, I.C. 35-41-1-8, I.C. 35-41-1-9, I.C. 35-41-1-25, I.C., and I.C. 35-41-1-26; Instruction Nos. 14.47, 14.49, 14.57, 14.185, and 14.189.

There is no statutory definition of “sexual conduct” applicable to this offense. “Sexual conduct” as defined in I.C. 35-49-1-9 applies only to obscenity crimes in I.C. 35-49.

### Instruction No. 3.42.3. Child Solicitation—Victim Under Fourteen.

#### I.C. 35-42-4-6.

The crime of child solicitation is defined by statute as follows:

A person eighteen (18) years of age or older who knowingly or intentionally solicits



[a child] [an individual the person believes to be a child] under fourteen (14) years of age to engage in [sexual intercourse] [deviate sexual conduct] [any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person] commits child solicitation, a Class D felony.

[The offense is a Class C felony if it is committed by using a computer network.]

[The offense is a Class B felony if the person solicits [the child] [the individual the person believes to be a child] under fourteen (14) years of age to engage in [sexual intercourse] [deviate sexual conduct] and commits the offense by using a computer network and travels to meet the child or individual the person believes to be a child.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when eighteen (18) years of age or older
3. knowingly or intentionally
4. solicited [*name child*] [*name individual Defendant is alleged to have believed to be a child*  
*under 14*] to engage in  
[sexual intercourse]  
[deviate sexual conduct]  
[or]  
[fondling or touching intended to arouse or satisfy the sexual desires of (*name child*) (or) (Defendant)]
5. when [*name child*] was under fourteen (14) years of age  
[or]  
when Defendant believed [*name individual*] was a child under fourteen (14) years of age
- [6. (*for Class C felony*) and Defendant committed elements 1 through 5 by using a computer network].
- [7. (*for Class B felony; applies only to soliciting for sexual intercourse or deviate sexual conduct*)  
and Defendant  
committed elements 1 through 5 by using a computer network

(Text continued on page 3-85)





and

travelled to meet [*name child*] [*name individual Defendant is alleged to have believed to be a child under 14*]].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child solicitation, a Class D/C/B felony charged in Count \_\_\_\_\_.

### Comments

The terms “solicit,” “sexual intercourse,” “deviate sexual conduct,” and “computer network” are defined by law. See I.C. 35-42-4-6, I.C. 35-41-1-26, I.C. 35-41-1-9, and I.C. 35-43-2-3; Instruction Nos. 14.192, 14.189, 14.57, and 14.21.

Child solicitation as a Class B felony for having a previous unrelated conviction of the offense by using a computer network must be bifurcated. See Instruction No. 15.95.

**Instruction No. 3.42.4. Child Solicitation—Victim Fourteen to Fifteen.****I.C. 35-42-4-6.**

The crime of child solicitation is defined by statute as follows:

A person at least twenty-one (21) years of age who knowingly or intentionally solicits [a child at least fourteen (14) years of age but less than sixteen (16) years of age] [an individual the person believes to be a child at least fourteen (14) years of age but less than sixteen (16) years of age] to engage in [sexual intercourse] [deviate sexual conduct] [any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person] commits child solicitation, a Class D felony.

[The offense is a Class C felony if the person solicits [the child] [the individual the person believes to be a child at least fourteen (14) but less than sixteen (16) years of age] to engage in [sexual intercourse] [deviate sexual conduct] and makes the solicitation by using a computer network.]

[The offense is a Class B felony if the person solicits [the child] [the individual the person believes to be a child at least fourteen (14) but less than sixteen (16) years of age] to engage in [sexual intercourse] [deviate sexual conduct] and commits the offense by using a computer network and travels to meet [the child] [the individual].]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when twenty-one (21) years of age or older
3. knowingly or intentionally
4. solicited [*name alleged solicitee*] to engage in  
[sexual intercourse]  
[deviate sexual conduct]  
[or]  
[fondling or touching intended to arouse or satisfy the sexual desires of (*name child*) (or) (Defendant)]
5. when [*name alleged solicitee*] was  
[a child fourteen (14) or fifteen (15) years of age]  
[an individual whom Defendant believed was a child fourteen (14) or fifteen (15) years of age]
- [6. (for Class C felony; only when Defendant solicited engagement in sexual intercourse or deviate sexual conduct) and the Defendant committed the offense by using a computer network].



- [7. (for class B felony; only when Defendant solicited engagement in sexual intercourse or deviate sexual conduct) and the Defendant committed the offense by using a computer network and travelled to meet [the child] [the individual].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child solicitation, a Class D/C/B felony charged in Count \_\_\_\_\_.

### Comments

The terms "solicit," "sexual intercourse," "deviate sexual conduct," and "computer network" are defined by law. See I.C. 35-42-4-6, I.C. 35-41-1-26, I.C. 35-41-1-9, and I.C. 35-43-2-3; Instruction Nos. 14.192, 14.189, 14.57, and 14.21.

Solicitation of a child fourteen to fifteen by computer network as a Class B felony for having a previous unrelated conviction of solicitation of a child fourteen to fifteen by using a computer network must be bifurcated. See Instruction No. 15.97.

**Instruction No. 3.43.1. Child Exploitation—Managing or Producing.****I.C. 35-42-4-4.**

The crime of child exploitation is defined by law as follows:

A person who knowingly or intentionally [manages] [produces] [sponsors] [presents] [exhibits] [photographs] [films] [videotapes] [creates a digitized image of] any performance or incident that includes sexual conduct by a child under eighteen (18) years of age commits child exploitation, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [managed] [produced] [sponsored] [presented] [exhibited] [photographed] [filmed] [videotaped] [created a digitized image of]
4. sexual conduct by [name] when [name] was a child under eighteen (18) years of age.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child exploitation, a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

The term “sexual conduct” is defined in Instruction No. 3.43.4.

I.C. 35-42-4-4(d) provides that this variety of child exploitation “do[es] not apply to a bona fide school, museum, or public library that qualifies for certain property tax exemptions under I.C. 6-1.1-10, or to an employee of such a school, museum, or public library acting within the scope of the employee’s employment when the possession of the listed materials is for legitimate scientific or educational purposes.”

I.C. 35-42-4-4(e) provides that “It is a defense to a prosecution under this section that: (1) the person is a school employee; and (2) the acts constituting the elements of the offense were performed solely within the scope of the person’s employment as a school employee.”

I.C. 35-42-4-4(d) provides that the offense does not apply “to a bona fide school, museum, or public library that qualifies for certain property tax exemptions under I.C. 6-1.1-10, or to an employee of such a school, museum, or public library acting within the scope of the employee’s employment when the possession of the listed materials is for legitimate scientific or educational purposes.”

The Defendant may invoke the defense in I.C. 35-42-4-4(f). For this defense, see Instruction No. 3.43B.



**Instruction No. 3.43.2. Child Exploitation—Disseminating.****I.C. 35-42-4-4.**

The crime of child exploitation is defined by law as follows:

A person who knowingly or intentionally [disseminates] [exhibits to another person] [offers to disseminate or exhibit to another person][sends or brings into Indiana for dissemination or exhibition] matter that depicts or describes sexual conduct by a child under eighteen (18) years of age commits child exploitation, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [disseminated] [exhibited to another person] [offered to disseminate or exhibit to another person] [sent or brought into Indiana for dissemination or exhibition]
4. matter that depicted or described sexual conduct by [name] when [name] was a child under eighteen (18) years of age.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child exploitation, a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

Use Instruction No. 3.43.4 defining “sexual conduct” for purposes of this offense.

The terms “disseminate” and “matter” are defined by law. See I.C. 35-42-4-4 and 35-49-1-3; Instruction Nos. 14.65 and 14.133.

I.C. 35-42-4-4(d) provides that this variety of child exploitation “do[es] not apply to a bona fide school, museum, or public library that qualifies for certain property tax exemptions under I.C. 6-1.1-10, or to an employee of such a school, museum, or public library acting within the scope of the employee’s employment when the possession of the listed materials is for legitimate scientific or educational purposes.”

I.C. 35-42-4-4(e) provides that “It is a defense to a prosecution under this section that: (1) the person is a school employee; and (2) the acts constituting the elements of the offense were performed solely within the scope of the person’s employment as a school employee.”

The Defendant may invoke the defense in I.C. 35-42-4-4(f). For this defense, see Instruction No. 3.43B.

**Instruction No. 3.43.3. Child Exploitation—Computer.****I.C. 35-42-4-4.**

The crime of child exploitation is defined by law as follows:

A person who knowingly or intentionally makes available to another person a computer, knowing that the computer's fixed drive or peripheral device contains matter that depicts or describes sexual conduct by a child less than eighteen (18) years of age commits child exploitation, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. made available to [name], another person
4. a computer
5. when Defendant knew that the computer's fixed drive or peripheral device contained matter depicting or describing sexual conduct by a child less than eighteen (18) years of age.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child exploitation, a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

The term "sexual conduct" is defined in Instruction No. 3.43.4.

The term "matter" is defined by law. *See* I.C. 35-42-4-4; Instruction No. 14.65.

I.C. 35-42-4-4(d) provides that this variety of child exploitation "do[es] not apply to a bona fide school, museum, or public library that qualifies for certain property tax exemptions under I.C. 6-1.1-10, or to an employee of such a school, museum, or public library acting within the scope of the employee's employment when the possession of the listed materials is for legitimate scientific or educational purposes."

I.C. 35-42-4-4(e) provides that "It is a defense to a prosecution under this section that: (1) the person is a school employee; and (2) the acts constituting the elements of the offense were performed solely within the scope of the person's employment as a school employee."

The Defendant may invoke the defense in I.C. 35-42-4-4(f). For this defense, see Instruction No. 3.43B.



**Instruction No. 3.43.3A. Child Exploitation—Performance or Incident.****I.C. 35-42-4-4.**

The crime of child exploitation is defined by law as follows:

A person who, with the intent to satisfy or arouse the sexual desires of any person, knowingly or intentionally (manages) (produces) (sponsors) (presents) (exhibits) (photographs) (films) (videotapes) (creates) a digitized image of any performance or incident that includes (the uncovered genitals of a child less than eighteen (18) years of age) (the exhibition of the female breast with less than a fully opaque covering of any part of the nipple) by a child less than eighteen (18) years of age commits child exploitation, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to satisfy or arouse the sexual desires of any person
3. knowingly or intentionally
4. (managed)  
(or)  
(produced)  
(or)  
(sponsored)  
(or)  
(presented)  
(or)  
(exhibited)  
(or)  
(photographed)  
(or)  
(filmed)  
(or)  
(videotaped)  
(or)  
(created)
5. a digitized image of a performance or incident that included

(the uncovered genitals of a child less than eighteen (18) years of age)

(or)

(the exhibition of the female breast with less than a fully opaque covering of any part of the nipple by a child less than eighteen (18) years of age).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child exploitation, a Class C felony, charged in Count                     .

### Comments

The terms “matter” and “performance” are defined by law. See I.C. 35-42-4-4; Instruction Nos. 14.133 and 14.151.

I.C. 35-42-4-4(d) provides that this variety of child exploitation “do[es] not apply to a bona fide school, museum, or public library that qualifies for certain property tax exemptions under I.C. 6-1.1-10, or to an employee of such a school, museum, or public library acting within the scope of the employee’s employment when the possession of the listed materials is for legitimate scientific or educational purposes.”

I.C. 35-42-4-4(e) provides that “It is a defense to a prosecution under this section that: (1) the person is a school employee; and (2) the acts constituting the elements of the offense were performed solely within the scope of the person’s employment as a school employee.”

The Defendant may invoke the defense in I.C. 35-42-4-4(f). For this defense, see Instruction No. 3.43B.



**Instruction No. 3.43.3B. Child Exploitation—Disseminating or Exhibiting  
Matter.**

**I.C. 35-42-4-4.**

The crime of child exploitation is defined by law as follows:

A person who, with the intent to satisfy or arouse the sexual desires of any person, knowingly or intentionally (disseminates to another person) (exhibits to another person) (offers to [disseminate] [exhibit] to another person) ([sends][brings] into Indiana for [dissemination] [exhibition]) matter that depicts (the uncovered genitals of a child less than eighteen (18) years of age) (the exhibition of the female breast with less than a fully opaque covering of any part of the nipple by a child less than eighteen (18) years of age) commits child exploitation, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to satisfy or arouse the sexual desires of any person
3. knowingly or intentionally
4. (disseminated to another person)

(or)

(exhibited to another person)

(or)

(offered to [disseminate] [exhibit] to another person)

(or)

([sent] [brought] into Indiana for [dissemination] [exhibition])

5. matter that depicted

(the uncovered genitals of a child less than eighteen (18) years of age)

(or)

(the exhibition of the female breast with less than a fully opaque covering of any part of the nipple by a child less than eighteen (18) years of age).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child exploitation, a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms “disseminate” and “matter” are defined by law. See I.C. 35-42-4-4; Instruction Nos. 14.65 and 14.133.

I.C. 35-42-4-4(d) provides that this variety of child exploitation “do[es] not apply to a bona fide school, museum, or public library that qualifies for certain

property tax exemptions under I.C. 6-1.1-10, or to an employee of such a school, museum, or public library acting within the scope of the employee's employment when the possession of the listed materials is for legitimate scientific or educational purposes."

I.C. 35-42-4-4(e) provides that "It is a defense to a prosecution under this section that: (1) the person is a school employee; and (2) the acts constituting the elements of the offense were performed solely within the scope of the person's employment as a school employee."

The Defendant may invoke the defense in I.C. 35-42-4-4(f). For this defense, see Instruction No. 3.43B.



**Instruction No. 3.43.3C. Child Exploitation—By Computer.****I.C. 35-42-4-4.**

The crime of child exploitation is defined by law as follows:

A person who, with intent to satisfy or arouse the sexual desires of any person, makes available to another person a computer, knowing that the computer's fixed drive or peripheral device contains matter that depicts (the uncovered genitals of a child less than eighteen (18) years of age) (the exhibition of the female breast with less than a fully opaque covering of any part of the nipple by a child less than eighteen (18) years of age) commits child exploitation, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to satisfy or arouse the sexual desires of any person
3. made available to (name), another person,
4. a computer
5. with knowledge that the computer's fixed drive or peripheral device contained
6. matter that depicted

(the uncovered genitals of a child less than eighteen (18) years of age)  
(or)

(the exhibition of the female breast with less than a fully opaque covering of any part of the nipple by a child less than eighteen (18) years of age).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child exploitation, a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

I.C. 35-42-4-4(d) provides that this variety of child exploitation "do[es] not apply to a bona fide school, museum, or public library that qualifies for certain property tax exemptions under I.C. 6-1.1-10, or to an employee of such a school, museum, or public library acting within the scope of the employee's employment when the possession of the listed materials is for legitimate scientific or educational purposes."

I.C. 35-42-4-4(e) provides that "It is a defense to a prosecution under this section that: (1) the person is a school employee; and (2) the acts constituting the elements of the offense were performed solely within the scope of the person's employment as a school employee."

The Defendant may invoke the defense in I.C. 35-42-4-4(f). For this defense, see Instruction No. 3.43B.

**Instruction No. 3.43.4. Sexual Conduct (Child Exploitation and Child Pornography only).**

**I.C. 35-42-4-4(a).**

The term “sexual conduct” means:

[sexual intercourse]

[deviate sexual conduct]

[exhibition of (the uncovered genitals) (the female breast with less than a fully opaque covering of any part of the nipple) intended to satisfy or arouse the sexual desires of any person]

[sodomasochistic abuse]

[sexual intercourse with an animal]

[deviate sexual conduct with an animal]

[any fondling or touching of a child by another person intended to arouse or satisfy the sexual desires of either the child or the other person]

[any fondling or touching of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person].

**Comments**

The terms “sexual intercourse” and “deviate sexual conduct” are defined by law. See I.C. 35-41-1-26 and I.C. 35-41-1-9; Instruction Nos. 14.189 and 14.57.



**Instruction No. 3.43A. Possession of Child Pornography.****I.C. 35-42-4-4.**

The crime of possession of child pornography is defined by law as follows:

A person who knowingly or intentionally possesses [a picture] [a drawing] [a photograph] [a negative image] [undeveloped film] [a motion picture] [a videotape] [a digitized image] [any pictorial representation] that depicts or describes sexual conduct by a child who the person knows is less than eighteen (18) years of age or appears to be less than eighteen (18) years of age, and that lacks serious literary, artistic, political, or scientific value commits possession of child pornography, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. possessed
4. [a picture] [a drawing] [a photograph] [a negative image] [undeveloped film] [a motion picture] [a videotape] [a digitized image] [a pictorial representation]
5. which depicted or described sexual conduct
6. by a person who  
[the Defendant knew was less than eighteen (18) years of age]  
[or]  
[appeared to be less than eighteen (18) years of age]
7. and which lacked serious literary, artistic, political, or scientific value.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of child pornography, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

Use Instruction No. 3.43.4, defining “sexual conduct” for purposes of this offense.

I.C. 35-42-4-4(d) provides that possession of child pornography “do[es] not apply to a bona fide school, museum, or public library that qualifies for certain property tax exemptions under I.C. 6-1.1-10, or to an employee of such a school, museum, or public library acting within the scope of the employee’s employment when the possession of the listed materials is for legitimate scientific or educational purposes.”

I.C. 35-42-4-4(e) provides that “It is a defense to a prosecution under this section that: (1) the person is a school employee; and (2) the acts constituting the

elements of the offense were performed solely within the scope of the person's employment as a school employee."

The Defendant may invoke the defense in I.C. 35-42-4-4(f). For this defense, see Instruction No. 3.43B.



**Instruction No. 3.43B. Sexting Defense to Child Exploitation—Managing or Producing, Child Exploitation—Disseminating, Child Exploitation—Computer, Possession of Child Pornography, Child Exploitation—Performance or Incident, Child Exploitation—Disseminating or Exhibiting Matter, and Child Exploitation—By Computer.**

**I.C. 35-42-4-4(e).**

It is a defense to Child Exploitation if all the following apply:

- (1) a cellular telephone, another wireless or cellular communications device, or a social networking web site was used to possess, produce, or disseminate the image  
and
- (2) the defendant was not more than four (4) years older or younger than the person who was depicted in the image or who received the image  
and
- (3) the relationship between the defendant and the person who received the image or who is depicted in the image was (a dating relationship) (an ongoing personal relationship other than a family relationship)  
and
- (4) the Defendant was less than twenty-two (22) years of age at the time of the offense  
and
- (5) the person who received the image or who was depicted in the image acquiesced in the Defendant's conduct.

\*The Defendant has the burden to prove this defense by a the greater weight of the evidence.

The defense above does not apply if the State proves beyond a reasonable doubt that:

- (1) the person who received the image disseminated it to a person other than the person (who sent the image) (who was depicted in the image)  
(or)
- (2) the image was of a person other than the person who sent the image or received the image  
(or)
- (3) the dissemination of the image violated:
  - (A) a protective order to prevent domestic or family violence issued under IC 34-26-5 (or, if the order involved a family or household member, under IC 34-26-2 or IC 34-4-5.1-5 before their repeal)

- (or)
- (B) an ex parte protective order issued under IC 34-26-5 (or, if the order involved a family or household member, an emergency order issued under IC 34-26-2 or IC 34-4-5.1 before their repeal)
- (or)
- (C) a workplace violence restraining order issued under IC 34-26-6
- (or)
- (D) a no contact order in a dispositional decree issued under IC 31-34-20-1, IC 31-37-19-1, or IC 31-37-5-6 (or IC 31-6-4-15.4 or IC 31-6-4-15.9 before their repeal) or an order issued under IC 31-32-13 (or IC 31-6-7-14 before its repeal) that orders the person to refrain from direct or indirect contact with a child in need of services or a delinquent child
- (or)
- (E) a no contact order issued as a condition of pretrial release, including release on bail or personal recognizance, or pretrial diversion, and including a no contact order issued under IC 35-33-8-3.6
- (or)
- (F) a no contact order issued as a condition of probation
- (or)
- (G) a protective order to prevent domestic or family violence issued under IC 31-15-5 (or IC 31-16-5 or IC 31-1-11.5-8.2 before their repeal)
- (or)
- (H) a protective order to prevent domestic or family violence issued under IC 31-14-16-1 in a paternity action
- (or)
- (I) a no contact order issued under IC 31-34-25 in a child in need of services proceeding or under IC 31-37-25 in a juvenile delinquency proceeding
- (or)
- (J) an order issued in another state that is substantially similar to an order described in clauses (A) through (I)
- (or)
- (K) an order that is substantially similar to an order described in clauses (A) through (I) and is issued by an Indian:
- (i) tribe;



- (ii) band;
- (iii) pueblo;
- (iv) nation; or
- (v) organized group or community, including an Alaska Native village or regional or village corporation as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)

that is recognized as eligible for the special programs and services provided by the United States to Indians because of their special status as Indians

(or)

(L) an order issued under IC 35-33-8-3.2

(or)

(M) an order issued under IC 35-38-1-30.

### Comments

This instruction can be used when the defense is invoked in prosecutions for Child Exploitation—Managing or Producing, Instruction No. 3.43.1; Child Exploitation—Disseminating, Instruction No. 3.43.2; Child Exploitation—Computer, Instruction No. 3.43.3; Possession of Child Pornography, Instruction No. 3.43A; Child Exploitation—Performance or Incident, Instruction No. 3.43.3A; Child Exploitation—Disseminating or Exhibiting Matter, Instruction No. 3.43.3B; and Child Exploitation—By Computer, Instruction No. 3.43.3C.

The court should instruct separately on the greater weight of the evidence by using Model Civil Jury Instruction No. 111:

Evidence is of the greater weight if it convinces you more strongly of its truthfulness. It is evidence that convinces you that something is more probably true than not true.

A greater number of witnesses testifying to a fact on one side or a greater quantity of evidence introduced on one side does not necessarily amount to the greater weight of the evidence.

\*The statute creating the defense does not expressly state whether the legislature intended that the accused has the burden to prove the defense. The Committee believes the burden may be properly assigned to the defendant, based on caselaw:

The burden of proving a defense may be placed on the defendant so long as proving the defense does not require the defendant to negate an element of the crime. *Martin v. Ohio*, 480 U.S. 228, 233-34, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987). If the defense specifically negates an element of the crime, however, the State has the burden to prove beyond a reasonable doubt the absence of the

defense. *Blatchford v. State*, 673 N.E.2d 781, 782 (Ind. Ct. App. 1996)  
*Moon v. State*, 823 N.E.2d 710, 714 (Ind. Ct. App. 2005).



**Instruction No. 3.44. Unlawful Employment Near Children.****I.C. 35-42-4-10.**

The crime of unlawful employment near children by a sexual predator is defined by law as follows:

A person who is

[an offender under I.C. 35-38-1-7.5]

[an offender under I.C. 35-42-4-11]

and knowingly or intentionally works for compensation or as a volunteer [on school property] [at a youth program center] [at a public park] commits unlawful employment near children, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. [was a sexually violent predator because (*insert factual aspects of alleged sexually violent predator status—e.g., the combination of prior convictions on which status is based*)]

[or]

[had been convicted once or more of

[committing]

[or]

[attempting to commit]

[or]

[conspiring to commit]

(child molesting {IC 35-42-4-3\*})

(or)

(child exploitation {IC 35-42-4-4(b)\*})

(or)

(child solicitation {IC 35-42-4-6\*})

(or)

(child seduction {IC 35-42-4-7\*})

(or)

(kidnapping {IC 35-42-3-2}\* , if the victim is less than eighteen {18} years of age)

(or)

(an offense in another jurisdiction that is substantially similar to {child molesting} {child exploitation} {child solicitation} {child seduction} {kidnapping, if the victim is less than eighteen (18) years of age}))

3. when the Defendant
4. [knowingly] [intentionally]
5. worked for compensation or as a volunteer;
6. [on school property]  
[or]  
[at a youth program center]  
[or]  
[at a public park].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of unlawful employment near children, a Class D felony.

### Comments

\*The statute numbers in this definitional paragraph are for the benefit of the judge, and are not intended to be given to the jury.

The terms “offender under I.C. 35-38-1-7.5,” “offender under I.C. 35-42-4-11,” “school property,” “family housing complex,” and “youth program center” are defined by law. See I.C. 35-38-1-7.5, I.C. 35-42-4-11, I.C. 35-41-1-24.7, I.C. 35-41-1-10.5, and I.C. 35-41-1-29; Instruction Nos. 14.190.1 to 14.190.5, 14.140, 14.183, 14.83a and 14.221.

\*The statute numbers in this definitional paragraph are for the benefit of the judge, and are not intended to be given to the jury.

Trial of this offense as a C felony for having a prior conviction must be bifurcated. See Chapter 15, Instruction No. 15.89.

The Committee has concluded that the “substantially similar” issue about another jurisdiction’s offense is for the court to determine, by judicially noticing the offense’s definition and comparing it with the Indiana offense. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”). In making the similarity determination, the court must look at the definition of the other jurisdiction’s offense in effect at the time of the Indiana crime charged in the current prosecution. See *State v. Akins*, 824 N.E.2d 676 (Ind. 2005) (with Indiana OVWI “previous conviction of operating while intoxicated” definition as a conviction “in any other jurisdiction in which the elements of the crime for which the conviction was entered are substantially similar to the elements of” the Indiana



offense," "the correct comparison is between the Michigan statute under which the defendant was convicted and the Indiana statute at the time of the Indiana offense," not at the time the prior Michigan conviction was entered).

**Instruction No. 3.44b. Sex Offender Residency Offense.****I.C. 35-42-4-11.**

The sex offender residency offense is defined by law as follows:

A person required to register as an offender under I.C. 11-8-8 who has been found to be an offender under I.C. 35-42-4-11 and who knowingly or intentionally

[spends more than three (3) nights in any thirty (30) day period

(in a residence)

(in a particular location, if the person does not reside in a residence)

within one thousand (1,000) feet of

(school property, not including property of an institution providing post-secondary education)

(a youth program center)

(a public park)]

[or]

[establishes a residence within one (1) mile of the residence of the victim of the person's sex offense]

commits the sex offender residency offense, a CII.C. 35-42-1-6.ass D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was required to register as an offender under Indiana Code Chapter 11-8-8
3. and had been found to be an offender under I.C. 35-42-4-11
4. when the Defendant [knowingly] [intentionally]
5. [spent more than three (3) nights in any thirty (30) day period  
(in a residence)  
(in a particular location, if the Defendant did not reside in a residence)  
within one thousand (1,000) feet of  
(school property, not including property of an institution providing post-secondary education)  
(a youth program center)  
(a public park)]

[or]

[established a residence within one (1) mile of the residence of (name victim),



who was the victim of Defendant's (describe alleged sex offense against victim) sex offense].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of the sex offender residency offense, a Class D felony.

### Comments

The terms "offender under I.C. 35-42-4-11," "public park," "school property," "sexually violent predator," and "youth program center" are defined by law. See I.C. 35-42-4-11, I.C. 35-41-1-23.7, I.C. 35-41-1-24.7, I.C. 35-38-1-7.5, and I.C. 35-41-1-29; Instruction Nos. 14.140, 14.166a, 14.183, 14.190, and 14.221.

**Instruction 3.45. Child Seduction—No Professional Relationship.****I.C. 35-42-4-7.**

The crime of child seduction is defined by law as follows:

If a person who is at least eighteen (18) years of age and is [the guardian of] [the adoptive parent of] [the adoptive grandparent of] [the custodian of] [the stepparent of] [the child care worker for] a child at least sixteen (16) years of age but less than eighteen (18) years of age engages in [any fondling or touching with the intent to arouse or satisfy the sexual desires of either the child or the adult with the child the person commits child seduction, a Class D felony.] [(sexual intercourse) (deviate sexual conduct) with the child the person commits child seduction, a Class C felony.]]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. When the Defendant was eighteen (18) or more years of age
2. and when the Defendant was (the guardian of) (the adoptive parent of)
3. (the adoptive grandparent of) (the custodian of) (the stepparent of) (*name*)
4. the Defendant
- [5. [*use only when fondling or touching version of crime is charged*] with the intent to gratify the sexual desires of either (*name*) or Defendant
6. knowingly\*
7. engaged in (sexual intercourse) (deviate sexual conduct) (fondling or touching) with (*name*)
8. when (*name*) was a child at least sixteen (16) years of age but less than eighteen (18) years of age.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child seduction, a Class [D] [C] felony, charged in Count\_\_\_\_\_.

**Comments**

The terms “adoptive parent,” “adoptive grandparent,” “child care worker,” “custodian,” “deviate sexual conduct,” “sexual intercourse” and “stepparent” are defined by law. See I.C. 35-42-4-7, 35-41-1-9, 35-41-1-26; Instruction Nos. 14.05, 14.03, 14.16b, 14.43, 14.57, 14.189 and 14.195.

\*The Indiana Supreme Court has recently observed that, in the “fondling or touching” version of the child molesting offense, I.C. 35-42-4-3(b):

[T]he Legislature intended that it be unnecessary for the State to prove that the alleged fondling or touching was performed with any level of mental culpability whatsoever in order to obtain a conviction. But we and the Court of Appeals have nevertheless long held that criminal intent is an element of the offense. [Citations omitted.] And neither court has ever held that a level of mental culpability more severe than “knowing” was required in this regard.



*Louallen v. State*, 778 N.E.2d 794, 797–98 (Ind. 2002).

It appears to the Committee that this child seduction statute, like the child molesting statute, was not intended to have “any level of mental culpability whatsoever.” And, in contrast with the child molesting crime, no appellate court has considered whether a culpability element is to be implied or required for child seduction. Recent caselaw should always be checked to determine whether the child seduction culpability level, if any, has been addressed on appeal. Until the issue is resolved, the Committee recommends the use of “knowingly” as indicated.

**Instruction No. 3.45.1. Child Seduction—Professional Relationship.****I.C. 35-42-4-7.**

The crime of child seduction is defined by law as follows:

A person who:

- (1) has or had a professional relationship with a child at least sixteen (16) years of age but less than eighteen (18) years of age whom the person knows to be at least sixteen (16) years of age but less than eighteen (18) years of age;
- (2) may exert undue influence on the child because of the person's current or previous professional relationship with the child; and
- (3) uses or exerts the person's professional relationship to engage in  
[any fondling or touching with the child with the intent to arouse or satisfy the sexual desires of the child or the person commits child seduction, a Class D felony]  
[(sexual intercourse) (deviate sexual conduct) commits child seduction, a Class C felony].

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant (had) (formerly had) a professional relationship with (*name*), and
2. during or after the professional relationship
3. at a time when (*name*) was at least sixteen (16) years of age but was less than eighteen (18) years of age, and
4. when the Defendant knew that (*name*) was at least sixteen (16) years of age but was less than eighteen (18) years of age, and
5. when the Defendant could exert undue influence on (*name*) because of Defendant's (current)  
(previous) professional relationship with (*name*),
6. the Defendant knowingly\* used or exerted the Defendant's professional relationship to  
engage with (*name*) in (sexual intercourse) (deviate sexual conduct) (fondling or touching)
7. (*use only when fondling or touching version of crime is charged*) with with the intent to arouse  
or satisfy the sexual desires of either (*name*) or Defendant].

If the State failed to prove each of these elements beyond a reasonable doubt, you



must find the Defendant not guilty of child seduction, a Class [D] [C] felony, charged in Count\_\_\_\_\_.

### Comments

The terms “deviate sexual conduct,” “professional relationship,” “sexual intercourse” and “are defined by law. See 35-41-1-9, I.C. 35-42-4-7, 35-41-1-26; Instruction Nos. 14.57, 14.162, and 14.189.

\*The Indiana Supreme Court has observed that, in the “fondling or touching” version of the child molesting offense, I.C. 35-42-4-3(b), the mental state required may be either knowingly or intentionally. *Louallen v. State*, 778 N.E.2d 794, 797 (Ind. 2002).

It appears to the Committee that this child seduction statute, like the child molesting statute, was not intended to have “any level of mental culpability whatsoever.” And, in contrast with the child molesting crime, no appellate court has considered whether a culpability element is to be implied or required for child seduction. Recent caselaw should always be checked to determine whether the child seduction culpability level, if any, has been addressed on appeal. Until the issue is resolved, the Committee recommends the use of “knowingly” as indicated.

**Instruction No. 3.47. Sexual Battery.****I.C. 35-42-4-8.**

The crime of sexual battery is defined by law as follows:

A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person,

- touches another person when that person is [compelled to submit to the touching by force or the imminent threat of force] [so mentally disabled or deficient that consent to the touching cannot be given]
- or
- touches another person's genitals, pubic area, buttocks, or female breast when that person is unaware that the touching is occurring

commits sexual battery, a Class D felony.

[However, the offense is a Class C felony if (it is committed by using or threatening the use of deadly force) (it is committed while armed with a deadly weapon) (the commission of the offense is facilitated by furnishing the child, without the child's knowledge, a drug or a controlled substance) (the commission of the offense is facilitated by knowing that the child was furnished the drug or controlled substance without the child's knowledge).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to arouse or satisfy [his] [her] own sexual desires or the sexual desires of [name]
3. knowingly\*
- {4. touched [name]

when [name] was

[compelled to submit to the touching by force or the imminent threat of force]

[or]

[so mentally disabled or deficient that consent to the touching could not be given]]

{or}

- {4. touched [name's]

[genitals]

[or]

[pubic area]



[or]

[buttocks]

[or]

[female breast]

when [name] was unaware that the touching was occurring }

- [5. (and elements 1 through 4 were committed by using or threatening the use of deadly force)

(or)

(and when committing elements 1 through 5 Defendant was armed with a deadly weapon)

(or)

(and the Defendant's commission of elements 1 through 5 was facilitated by furnishing [name] [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.)

(or)

(and the Defendant's commission of elements 1 through 5 was facilitated by knowing that [name] had been furnished [name drug or controlled substance alleged], a [drug] [controlled substance]), without [name]'s knowledge.)

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of sexual battery, a Class D/C felony, charged in Count \_\_\_\_\_.

### Comments

The terms "controlled substance," "deadly force", "deadly weapon," and "drug" are defined by law. See I.C.35-48-1-9, I.C. 35-41-1-7, I.C. 35-41-1-8, and I.C. 35-48-1-16,; Instruction Nos. 14.31, 14.47, 14.49, and 14.71.

\*The Indiana Supreme Court has observed that, in the "fondling or touching" version of the child molesting offense, I.C. 35-42-4-3(b), the mental state required may be either knowingly or intentionally. *Louallen v. State*, 778 N.E.2d 794, 797 (Ind. 2002).

The Committee believes that the implication of a mental culpability element in child molesting, as in *Louallen*, and in sexual misconduct with a minor, as in *Warren v. State*, 701 N.E.2d 902 (Ind. Ct. App. 1998), supports implication of a "knowingly" mental culpability element in sexual battery. For this reason, the Committee has used "knowingly" as the appropriate element. If the State does choose to allege "intentionally," then "intentionally" should replace "knowingly." If the State chooses to allege "knowingly or intentionally," then "knowingly or intentionally" should replace "knowingly."

(Text continued on page 3-105)

1. The first part of the document is a letter from the President of the United States to the Vice President, dated 10/10/2019. The letter discusses the current state of the country and the challenges we face. It also mentions the upcoming election and the importance of maintaining the integrity of the democratic process.

2. The second part of the document is a letter from the Vice President to the President, dated 10/10/2019. The letter discusses the Vice President's views on the current state of the country and the challenges we face. It also mentions the upcoming election and the importance of maintaining the integrity of the democratic process.

3. The third part of the document is a letter from the President to the Vice President, dated 10/10/2019. The letter discusses the President's views on the current state of the country and the challenges we face. It also mentions the upcoming election and the importance of maintaining the integrity of the democratic process.

4. The fourth part of the document is a letter from the Vice President to the President, dated 10/10/2019. The letter discusses the Vice President's views on the current state of the country and the challenges we face. It also mentions the upcoming election and the importance of maintaining the integrity of the democratic process.

5. The fifth part of the document is a letter from the President to the Vice President, dated 10/10/2019. The letter discusses the President's views on the current state of the country and the challenges we face. It also mentions the upcoming election and the importance of maintaining the integrity of the democratic process.

6. The sixth part of the document is a letter from the Vice President to the President, dated 10/10/2019. The letter discusses the Vice President's views on the current state of the country and the challenges we face. It also mentions the upcoming election and the importance of maintaining the integrity of the democratic process.

7. The seventh part of the document is a letter from the President to the Vice President, dated 10/10/2019. The letter discusses the President's views on the current state of the country and the challenges we face. It also mentions the upcoming election and the importance of maintaining the integrity of the democratic process.

8. The eighth part of the document is a letter from the Vice President to the President, dated 10/10/2019. The letter discusses the Vice President's views on the current state of the country and the challenges we face. It also mentions the upcoming election and the importance of maintaining the integrity of the democratic process.

9. The ninth part of the document is a letter from the President to the Vice President, dated 10/10/2019. The letter discusses the President's views on the current state of the country and the challenges we face. It also mentions the upcoming election and the importance of maintaining the integrity of the democratic process.

10. The tenth part of the document is a letter from the Vice President to the President, dated 10/10/2019. The letter discusses the Vice President's views on the current state of the country and the challenges we face. It also mentions the upcoming election and the importance of maintaining the integrity of the democratic process.



**Instruction No. 3.48A. Failure to Warn of Dangerous Communicable Disease—I.C. 35-42-1-9. Class B Misdemeanor.**

The crime of failure to warn of dangerous communicable diseases defined by law as follows:

A person who knows he/she is a carrier of [acquired immune deficiency syndrome (AIDS)] [human immunodeficiency virus (HIV)] [Hepatitis B] has a duty to warn, or cause another person to warn a former or present [sex] [needle sharing] partner [with whom the carrier may have had] [before the carrier and the partner engage in] [sexual] [needle sharing] contact demonstrated epidemiologically to transmit [AIDS] [HIV] [Hepatitis B]}, of the carrier's disease status and the need to seek health care such as counseling and testing. A person who recklessly violates this duty commits a Class B misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when [he] [she] knew [he] [she] was a carrier of [acquired immune deficiency syndrome (AIDS)] [human immunodeficiency virus (HIV)] [hepatitis B]
3. recklessly
4. failed to warn [name alleged partner] of Defendant's [status of a carrier] [and] [of the need for (*name alleged partner*) to seek health care such as counseling and testing]
5. [when Defendant and (*name alleged partner*) may have engaged in]  
[or]  
[before Defendant and (*name alleged partner*) engaged in]
6. [describe alleged activity] , which was  
[sexual]  
[or]  
[needle sharing]  
activity which had been demonstrated epidemiologically to transmit  
[name disease(s) defendant allegedly carries—(AIDS) (HIV) (hepatitis B).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of failure to warn of dangerous communicable disease, a Class B misdemeanor, charged in Count \_\_\_\_\_.

**[Next Page is 3-109]**

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1861.

2. The letter is addressed to the Congress and is signed by the President. It contains a statement of the President's policy towards the South and the Union. The President states that he is committed to the Union and to the Constitution, and that he will use all the powers of the Executive to maintain the Union.

3. The letter also contains a statement of the President's policy towards the South. The President states that he is committed to the Union and to the Constitution, and that he will use all the powers of the Executive to maintain the Union.

4. The letter also contains a statement of the President's policy towards the South. The President states that he is committed to the Union and to the Constitution, and that he will use all the powers of the Executive to maintain the Union.

5. The letter also contains a statement of the President's policy towards the South. The President states that he is committed to the Union and to the Constitution, and that he will use all the powers of the Executive to maintain the Union.



**Instruction No. 3.48B. Failure to Warn of Dangerous Communicable Disease—I.C. 35-42-1-9. Class D Felony.**

The crime of failure to warn of dangerous communicable disease is defined by law as follows:

A person who knows he/she is a carrier of [acquired immune deficiency syndrome (AIDS)] [human immunodeficiency virus (HIV)] [hepatitis B] has a duty to warn, or cause another person to warn a former or present [sex] [needle sharing] partner [with whom the carrier may have had] [before the carrier and the partner engage in] [sexual] [needle sharing] contact demonstrated epidemiologically to transmit [AIDS] [HIV] [hepatitis B], of the carrier's disease status and the need to seek health care such as counseling and testing. A person who knowingly or intentionally violates this duty commits a Class D felony.

Before you may convict the Defendant, the State must must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when [he] [she] knew [he] [she] was a carrier of [acquired immune deficiency syndrome (AIDS)] [human immunodeficiency virus (HIV)] [hepatitis B]
3. knowingly or intentionally
4. failed to warn [*name alleged partner*] of Defendant's [status of a carrier] [and] [of the need for (*name alleged partner*) to seek health care such as counseling and testing]
5. [when Defendant and (*name alleged partner*) may have engaged in]  
[or]  
[before Defendant and (*name alleged partner*) engaged in]
6. [*describe alleged activity*], which was  
[sexual]  
[or]  
[needle sharing]

activity which had been demonstrated epidemiologically to transmit [*name disease(s) defendant allegedly carries—(AIDS) (HIV) (hepatitis B)*].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of failure to warn of dangerous communicable disease, a Class D felony, charged in Count                     .

**Instruction No. 3.49. Robbery.****I.C. 35-42-5-1.**

The crime of robbery is defined by law as follows:

A person who knowingly or intentionally takes property from another person or from the presence of another person [by using or threatening the use of force on any person] [by putting any person in fear] commits robbery, a class C felony.

[The offense is a class B felony if it (is committed while armed with a deadly weapon) (results in bodily injury to any person other than a defendant).] [The offense is a Class A felony if it results in serious bodily injury to any person other than a defendant.]

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. took property from [name]

[or]

took property from the presence of [name]

4. [by using or threatening the use of force on (name)]

[or]

[by putting (name) in fear]

- [5. and

(for Class B felony) (when committing elements 1 through 4

Defendant was armed with a deadly weapon)

(or)

(for Class B felony) (the commission of elements 1 through 4 resulted in bodily injury to [name person other than Defendant])

(or)

(for Class A felony) (the commission of elements 1 through 4 resulted in serious bodily injury to [name person other than Defendant]).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of robbery, a Class C/B/A felony, charged in Count

**Comments**

The terms “bodily injury,” “deadly weapon,” and “serious bodily injury” are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-8, and I.C. 35-41-1-25; Instruction Nos. 14.13, 14.49 and 14.185.



"Fear" in the robbery statute means fear of physical harm or personal injury. *Rigsby v. State*, 582 N.E.2d 910 (Ind. Ct. App. 1991). In some cases in which robbery by putting in fear is charged the term "fear" must be defined if the evidence and the defendant's theory of the case suggest fear of something other than physical harm might have induced the other person to part with the property. *Id.* (reversible error not to define "fear" when evidence suggested other person parted with property either from fear of physical harm or from fear of being arrested). A suggested definition of "fear" is found in Instruction 14.86.

**Instruction No. 3.51. Carjacking.**

**I.C. 35-42-5-2.**

The crime of carjacking is defined by law as follows:

A person who knowingly or intentionally takes a motor vehicle from another person or from the presence of another person by using or threatening the use of force on any person or by putting any person in fear, commits carjacking, a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. took a motor vehicle from [name]  
[or]  
took a motor vehicle from the presence of [name]
4. [by using or threatening the use of force on (name)]  
[or]  
[by putting (name) in fear].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the defendant not guilty of carjacking, a Class B felony, charged in Count \_\_\_\_\_.

*(Text continued on page 3-113)*



### 3-113 OFFENSES AGAINST THE PERSON

#### Comment

The term "motor vehicle" is defined by law. *See* I.C. 35-41-1-18.5 and I.C. 9-13-2-105(a); Instruction No. 14.137.

**Instruction No. 3.53. Overpass Mischief.****I.C. 35-42-2-5.**

The crime of overpass mischief is defined by law as follows:

A person who knowingly, intentionally or recklessly [drops, causes to drop, or throws an object from an overpass] [with intent that the object fall, places on an overpass an object that falls off the overpass] causing bodily injury to another person commits overpass mischief, a Class C felony. [The offense is a Class B felony if it results in serious bodily injury to another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally] [recklessly]
3. [dropped] [caused to drop] [threw] an object  
[or]  
[acting with intent that it fall placed an object that did fall]
4. from an overpass
5. causing bodily injury to [name]
6. (for Class B felony) and elements 1 through 5 resulted in serious bodily injury to (name).

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of overpass mischief, a Class C/B felony, charged in Count \_\_\_\_\_.



**Instruction No. 3.55. Promotion of Human Trafficking.****I.C. 35-42-3.5-1.**

The crime of promotion of human trafficking is defined by law as follows:

A person who by [force] [threat of force] [fraud] knowingly or intentionally [recruits] [harbors] [transports] another person [to engage the other person in (forced labor) (involuntary servitude)] [to force the other person into (marriage) (prostitution) (participating in sexual conduct)] commits promotion of human trafficking, a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. by [force] [threat of force] [fraud]
3. [knowingly] [intentionally]
4. [recruited]  
[or]  
[harbored]  
[or]  
[transported]
5. (*name other person*)
6. [to engage (*name other person*) in  
(forced labor)  
(or)  
(involuntary servitude)]  
[or]  
[to force (*name other person*) into  
(marriage)  
(or)  
(prostitution)  
(or)  
(participating in sexual conduct)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of promotion of human trafficking, a Class B felony, as charged in Count \_\_\_\_\_.

**Comment**

The term "sexual conduct" is defined by law. See I.C. 35-42-3.5-1; Instruction No. 14.188.

**Instruction No. 3.57. Sexual Trafficking of a Minor.****I.C. 35-42-3.5-1.**

The crime of sexual trafficking of a minor is defined by law as follows:

A person who is at least eighteen (18) years of age who knowingly or intentionally sells or transfers custody of a child less than eighteen (18) years of age for the purpose of prostitution or participating in sexual conduct commits sexual trafficking of a minor, a Class A felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. who was at the time at least eighteen (18) years of age
3. [knowingly] [intentionally]
4. sold or transferred custody of (*name child*)
5. when (*name child*) was less than eighteen (18) years of age
6. for the purpose of [prostitution] [participating in sexual conduct].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of sexual trafficking of a minor, a Class A felony, as charged in Court\_\_\_\_\_.

**Comment**

The term "sexual conduct" is defined by law. See I.C. 35-42-3.5-1; Instruction No. 14.188



**Instruction No. 3.59. Human Trafficking.****I.C. 35-42-3.5-1.**

The crime of human trafficking is defined by law as follows:

A person who knowingly or intentionally [pays] [offers to pay] [agrees to pay] money or other property to another person for an individual who the person knows has been forced into [forced labor], [involuntary servitude] [prostitution] commits human trafficking, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] or [intentionally]
3. [paid]  
[or]  
[offered to pay]  
[or]  
[agreed to pay]
4. money or other property
5. to (*name other person*)
6. for (*name individual*) who the Defendant knew had been forced into  
[forced labor]  
[or]  
[involuntary servitude]  
[or]  
[prostitution].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of human trafficking, a Class C felony, as charged in Count \_\_\_\_\_.

**Instruction No. 3.60. Promotion of Human Trafficking of a Minor.****I.C. 35-42-3.5-1.**

The crime of promotion of human trafficking of a minor is defined by law as follows:

A person who knowingly or intentionally [recruits] [harbors] [transports] a child less than eighteen (18) years of age with the intent of [engaging the child in (forced labor) (involuntary servitude)] [inducing or causing the child to (engage in prostitution) (engage in a performance or incident that includes sexual conduct in violation of IC 35-42-4-4(b) (child exploitation))] (participate in sexual conduct)] commits promotion of human trafficking of a minor, a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [recruited]  
[or]  
[harbored]  
[or]  
[transported]
4. (*name child*), who was at the time less than eighteen (18) years of age
5. with the intent of  
[engaging (*name child*) in  
(forced labor)  
(or)  
(involuntary servitude)]  
[or]  
[inducing or causing (*name child*) to  
(engage in prostitution)  
(or)  
(engage in a performance or incident that includes sexual conduct in violation of IC 35-42-4-4(b) (child exploitation))  
(or)  
(participate in sexual conduct)].

If the State failed to prove each of these elements beyond a reasonable doubt, you



must find the Defendant not guilty of promotion of human trafficking of a minor, a Class B felony, as charged in Count \_\_\_\_\_.

### Comment

The term “sexual conduct” is defined by law. *See* I.C. 35-42-3.5-1; Instruction No. 14.188.

I.C. 35-42-3.5-1(b) provides “[i]t is not a defense to a prosecution under this subsection that the child consented to engage in prostitution or to participate in sexual conduct.”

I.C. 35-42-3.5-1(e) provides for this defense when the charge is based on the defendant’s intent to induce or cause the child to participate in “sexual conduct”:

(e) It is a defense to a prosecution under subsection (b)(2)(B) if:

(1) the child is at least fourteen (14) years of age but less than sixteen (16) years of age and the person is less than eighteen (18) years of age; or

(2) all the following apply:

(A) The person is not more than four (4) years older than the victim.

(B) The relationship between the person and the victim was a dating relationship or an ongoing personal relationship. The term “ongoing personal relationship” does not include a family relationship.

(C) The crime:

(i) was not committed by a person who is at least twenty-one (21) years of age;

(ii) was not committed by using or threatening the use of deadly force;

(iii) was not committed while armed with a deadly weapon;

(iv) did not result in serious bodily injury;

(v) was not facilitated by furnishing the victim, without the victim’s knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim’s knowledge; and

(vi) was not committed by a person having a position of authority or substantial influence over the victim.

(D) The person has not committed another sex offense (as defined in IC 11-8-8-5.2), including a delinquent act that would be a sex offense if committed by an adult, against any other person.

**Instruction No. 3.61. Sex Offender Internet Offense.****I.C. 35-42-4-12.**

The crime of sex offender Internet offense is defined by statute as follows:

A sex offender who knowingly or intentionally violates a [condition of probation] [condition of parole] [rule of a community transition program] that prohibits the offender from using [a social networking web site] [an instant messaging or chat room program] to communicate, directly or through an intermediary, with a child less than sixteen (16) years of age commits a sex offender Internet offense, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was a sex offender [(use if defense does not stipulate sex offender status) because he had been convicted of (*list the I.C. 11-8-8-5 offense on which sex offender status is based*)]
3. and was subject to a  
[condition of probation]  
[condition of parole]  
[rule of a community transition program]  
that prohibited Defendant from using  
[a social net working web site]  
[an instant messaging or chat room program]  
to communicate, directly or through an intermediary, with a child less than sixteen (16) years of age
4. and the Defendant
5. [knowingly] [intentionally]
6. violated the [condition of probation] [condition of parole] [rule of a community transition program]
7. by using [a social net working web site] [an instant messaging or chat room program]
8. to communicate [directly] [through (*name intermediary*), an intermediary]
9. with (*name child*), a child who was at the time less than sixteen (16) years of age.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child solicitation, a Class A misdemeanor charged in Count \_\_\_\_\_.

**Comments**

Use Instruction 14.117.2a to define the term "instant messaging or chat room program."



Use Instruction 14.191.5 to define the term “social networking site.”

I.C. 35-42-4-12(c) provides that “[i]t is a defense to a prosecution under subsection (b) [the sex offender Internet offense] that the person reasonably believed that the child was at least sixteen (16) years of age.” The Committee believes that the State has the burden to disprove this defense beyond a reasonable doubt. See *Ringham v. State*, 768 N.E.2d 893 (Ind. 2002) (“[i]t is true that the State retains the ultimate burden of disproving a mistake of fact defense beyond a reasonable doubt”). The offense requires that the Defendant’s violation of the probation, parole, or community transition program condition be “knowingly” or “intentionally,” and this culpability element appears to encompass awareness of a high probability or a conscious purpose of communicating with a person under sixteen years of age. Since the State thus appears to have the burden to prove that the Defendant was either aware it was highly likely the person communicated with was under sixteen or had the conscious purpose of communicating with a person under sixteen, the “defense” would seem in fact to be no more than determining that the State had failed to prove an element. Accordingly, the Committee has not drafted an instruction on the “defense.” If the Defendant requests one and the trial court in its discretion decides to give an instruction, the Committee recommends:

It is a defense that the Defendant reasonably believed (*name child*) was sixteen (16) years of age or older. The State has the burden to prove beyond a reasonable doubt that the Defendant did not reasonably believe that (*name child*) was sixteen (16) years of age or older.

Trial of the sex offender Internet offense as a Class D felony due to a prior unrelated conviction for the same offense must be bifurcated. See Instruction No. 15.99.





# **CHAPTER 4**

## **OFFENSES AGAINST PROPERTY**

### **SYNOPSIS**

Instruction No. 4.01(a).	Arson (Damaging dwelling).
Instruction No. 4.01(b).	Arson (Endangering human life).
Instruction No. 4.01(c).	Arson (Loss at least \$5,000).
Instruction No. 4.01(d).	Arson (Structure Used for Religious Worship).
Instruction No. 4.03.	Arson (For Hire).
Instruction No. 4.05.	Arson (Intent to Defraud).
Instruction No. 4.07.	Arson (Property Damage \$250 to \$5,000).
Instruction No. 4.09(a).	Criminal Mischief — Damaging Property (B misdemeanor).
Instruction No. 4.09(b).	Criminal Mischief — Damaging Property (A Misdemeanor).
Instruction No. 4.09(c).	Criminal Mischief — Damaging Property (D felony).
Instruction No. 4.11(a).	Criminal Mischief — By Deception (B misdemeanor).
Instruction No. 4.11(b).	Criminal mischief — By Deception (A misdemeanor).
Instruction No. 4.11(c).	Criminal Mischief — By Deception (D felony).
Instruction No. 4.12(a).	Criminal Mischief — By Threat (B misdemeanor).
Instruction No. 4.12(b).	Criminal Mischief — By Threat (A misdemeanor).
Instruction No. 4.12(c).	Criminal Mischief — By Threat (D felony).
Instruction No. 4.13(a).	Institutional Criminal Mischief — A Misdemeanor.
Instruction No. 4.14(a).	Cemetery Mischief.
Instruction No. 4.14(b).	Damage to Cemetery Monuments or Grave Markers.
Instruction No. 4.15.	Computer Tampering.
Instruction No. 4.17.	Burglary.
Instruction No. 4.18.	Residential Entry.
Instruction No. 4.19.	Criminal Trespass (Entering Real Property).
Instruction No. 4.21.	Criminal Trespass (Refusing to Leave Real Property).
Instruction No. 4.23.	Criminal Trespass (Vehicles).
Instruction No. 4.25.	Criminal Trespass (Interfering with Possession of Property).
Instruction No. 4.27.	Criminal Trespass (Entering a Dwelling Without Consent).
Instruction No. 4.27a.	Criminal Trespass (Train Travel Without Consent).
Instruction No. 4.28(a).	Railroad Mischief — Signal Systems.

Instruction No. 4.28(b).	Railroad Mischief — Rail Systems.
Instruction No. 4.28(c).	Railroad Mischief — Locomotive and Cars.
Instruction No. 4.29.	Computer Trespass.
Instruction No. 4.31.	Theft.
Instruction No. 4.33.	Criminal Conversion.
Instruction No. 4.33.1.	Criminal Conversion — Motor Vehicle for Crime.
Instruction No. 4.35.	Auto Theft.
Instruction No. 4.36.	Unauthorized Entry of Motor Vehicle.
Instruction No. 4.37.	Receiving Stolen Property.
Instruction No. 4.39.	Receiving Stolen Auto Parts.
Instruction No. 4.41.	Receiving Stolen Property — Defense.
Instruction No. 4.42.	Conversion or Misappropriation of Title Insurance Escrow Funds.
Instruction No. 4.42.5(a).	Vending Machine Vandalism (Damaging).
Instruction No. 4.42.5(b).	Vending Machine Vandalism (Removing Contents).
Instruction No. 4.43.1.	Forgery.
Instruction No. 4.43.2.	Counterfeiting — Making or Uttering.
Instruction No. 4.43.3.	Counterfeiting — Possessing.
Instruction No. 4.45(a).	Fraud (Use of Credit Card).
Instruction No. 4.45(b).	Fraud (Failing to Furnish Property on Credit Card).
Instruction No. 4.45(c).	Fraud (Furnish Property with Intent to Defraud — Credit Card).
Instruction No. 4.45(d).	Fraud (Selling or Receiving Credit Card).
Instruction No. 4.45(e).	Fraud (Unlawful Security for Debt — Credit Card).
Instruction No. 4.55(g).	Fraud (Property).
Instruction No. 4.53(f).	Fraud (Receiving Unlawfully Obtained Property — I.C. 35-43-5-4(7). Credit Card).
Instruction No. 4.55(h).	Fraud (On Insurer).
Instruction No. 4.55(i).	Fraud (Recordings).
Instruction No. 4.56.1.	Insurance Fraud — False Claim Statement.
Instruction No. 4.56.2.	Insurance Fraud — False Statement.
Instruction No. 4.56.3.	Insurance Fraud — Risks for Insolvent Insurer.
Instruction No. 4.56.4.	Insurance Fraud — Removal of Insurer's Assets.
Instruction No. 4.56.5.	Insurance Fraud — Concealment of Insurer's Assets.
Instruction No. 4.56.6.	Insurance Fraud — Diversion of Funds.
Instruction No. 4.57(a).	Welfare Fraud (Unlawfully Obtaining).
Instruction No. 4.57(b).	Welfare Fraud (Unlawful Use).
Instruction No. 4.57(c).	Welfare Fraud (Unlawful Use of Incomplete I.C. 35-43-5-7(a)(3). Documents).
Instruction No. 4.57(d).	Welfare Fraud (Counterfeit Documents).
Instruction No. 4.57(e).	Welfare Fraud (Concealing Information).



Instruction No. 4.58(a1).	Medicaid Fraud (Claim Violating I.C. 12-15).
Instruction No. 4.58(a2).	Medicaid Fraud (Payment by False Statement).
Instruction No. 4.58(b).	Medicaid Fraud (Provider Number).
Instruction No. 4.58(c).	Medicaid Fraud (Provider Documents).
Instruction No. 4.58(d).	Medicaid Fraud (Concealing Information).
Instruction No. 4.59(a).	Fraud on a Financial Institution (Scheme to Defraud).
Instruction No. 4.60(a).	Check Fraud (Use of NSF Check, False Information).
Instruction No. 4.60(b).	Check Fraud (Insufficient Deposits).
Instruction No. 4.60(c).	Check Fraud (Multiple Accounts).
Instruction No. 4.61.	Check Deception.
Instruction No. 4.63.	Check Deception — Defense.
Instruction No. 4.65.	Check Deception — Defense.
Instruction No. 4.67.	False Representation — Disadvantaged or Women-Owned Business.
Instruction No. 4.69(a).	Home Improvement Fraud (Misrepresentation).
Instruction No. 4.69(b).	Home Improvement Fraud (False Impression).
Instruction No. 4.69(c).	Home Improvement Fraud (False Promise).
Instruction No. 4.69(d).	Home Improvement Fraud (Deception).
Instruction No. 4.69(e).	Home Improvement Fraud (Unconscionable Contract).
Instruction No. 4.69(g).	Home Improvement Fraud (Assumed Name).
Instruction No. 4.69(g)(1).	Home Improvement Fraud (Failure to Provide Warranty).
Instruction No. 4.69(g)(2).	Home Improvement Fraud (Use of Diluted, Modified, or Altered Materials).
Instruction No. 4.69(g)(3).	Home Improvement Fraud (False Claim of Referral, Licensure, or Permit).
Instruction No. 4.69(h).	Home Improvement Fraud (Illegal Practices to Obtain Home Improvement Contract).
Instruction No. 4.71.	Timber Spiking.
Instruction No. 4.73.	Devices to Obtain Cable Television Without Payment.
Instruction No. 4.75(a).	Unauthorized Use of Telecommunication Services (Making Unlawful Telecommunication Devices).
Instruction No. 4.75(b).	Unauthorized Use of Telecommunication Services (Sale of Unlawful Telecommunications Device).
Instruction No. 4.75(c).	Unauthorized Use of Telecommunication Services (Unlawful Plans or Instructions).
Instruction No. 4.75(d).	Unauthorized Use of Telecommunication Services (Providing Materials).
Instruction No. 4.75(e).	Unauthorized Use of Telecommunication Services (Publishing Information).
Instruction No. 4.77.	Cave Mischief.
Instruction No. 4.78.	Unlawful Procurement of Government Contract.
Instruction No. 4.79.	Impairment of Identification.



Instruction No. 4.81.	Receiving Property With Concealed or Altered Identification Number.
Instruction No. 4.83.	Theft of Title Insurance Funds.
Instruction No. 4.85(a).	Deception (Permitting Deposit in Insolvent Institution).
Instruction No. 4.85(b).	Deception (False Statements).
Instruction No. 4.85(c).	Deception (Misapplication of Property).
Instruction No. 4.85(d).	Deception (False Weights or Measures).
Instruction No. 4.85(e).	Deception (Fraudulently Obtaining Utilities).
Instruction No. 4.85(f).	Deception (Misrepresentation of Identity, Quality of Property).
Instruction No. 4.85(g).	Deception (Depositing Slugs).
Instruction No. 4.85(g).	Deception (Possessing Slugs).
Instruction No. 4.85(h).	Deception (False Advertising).
Instruction No. 4.85(i).	Deception (Misrepresentation as a Physician).
Instruction No. 4.85(j).	Deception (Defrauding Cable TV Provider).
Instruction No. 4.86.	Identity Deception.
Instruction No. 4.86a.	Possession of Card Skimming Device.
Instruction No. 4.86.2.	Synthetic Identity Deception.
Instruction No. 4.86.5.	Possession of Card Skimming Device.
Instruction No. 4.91.1.	Children's Health Insurance Program Fraud.
Instruction No. 4.91.2.	Children's Health Insurance Program Fraud.
Instruction No. 4.91.3.	Children's Health Insurance Program Fraud.
Instruction No. 4.91.4.	Children's Health Insurance Program Fraud.
Instruction No. 4.91.5.	Children's Health Insurance Program Fraud.
Instruction No. 4.95(a).	Insurance Fraud — 12-17.6 Violation.
Instruction No. 4.95(b).	Insurance Fraud — False Statement.
Instruction No. 4.95(c).	Insurance Fraud — Illegal Provider Number.
Instruction No. 4.95(d).	Insurance Fraud — Altered Documents.
Instruction No. 4.95(e).	Insurance Fraud — Concealed Information.
Instruction No. 4.97.	Possession of a Fraudulent Sales Document.
Instruction No. 4.99.	Possession of a Fraudulent Sales Document Manufacturing Device.
Instruction No. 4.101.	Making a False Sales Document.
Instruction No. 4.103.	Delivery of a False Sales Document.



**Instruction No. 4.01(a). Arson (Damaging dwelling).****I.C. 35-43-1-1(a)(1).**

The crime of arson is defined by law as follows:

A person who, by means of [fire] [explosive], [knowingly] [intentionally] damages a dwelling of another person without his consent commits arson, a Class B felony. [The offense is a Class A felony if it results in either bodily injury or serious bodily injury to any other person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. damaged
4. a dwelling of another person, (*name*)
5. by means of [fire] [explosive]
6. without (*name*)'s consent
7. [(*for Class A felony*) and it resulted in bodily injury/serious bodily injury to (*name person alleged to have been injured*)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of arson, a Class A/B felony, as charged in Count \_\_\_\_\_.

(Text continued on page 4-5)





**Comment**

Only those parts of the statute defining the offense should be included that are made relevant by the allegations of the charging information.

An additional element — disproving a defense — should be given as a final instruction after evidence has been introduced to put the defense in issue.

The terms “bodily injury,” “dwelling,” “property,” and “serious bodily injury” are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-10, I.C. 35-41-1-23 and I.C. 35-41-1-25; Instruction Nos. 14.13, 14.75, 14.165 and 14.185.

**Instruction No. 4.01(b). Arson (Endangering human life).****I.C. 35-43-1-1(a)(2).**

The crime of arson is defined by law as follows:

A person who, by means of [fire] [explosive], [knowingly] [intentionally] damages property of any person under circumstances that endanger human life commits arson, a Class B felony. [The offense is a Class A felony if it results in either bodily injury or serious bodily injury to any other person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. damaged
4. property of any person, (name)
5. by means of [fire] [explosive]
6. under circumstances that endangered human life
7. (for Class A felony) and it resulted in bodily injury/serious bodily injury to (name person alleged to have been injured)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of arson, a Class A/B felony, as charged in Count \_\_\_\_\_.



**Comment**

The terms "bodily injury," "property," and "serious bodily injury" are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-23 and I.C. 35-41-1-25; Instruction Nos. 14.13, 14.165 and 14.185.

**Instruction No. 4.01(c). Arson (Loss at least \$5,000).****I.C. 35-43-1-1(a)(3).**

The crime of arson is defined by law as follows:

A person who, by means of [fire] [explosive], [knowingly] [intentionally] damages property of another person without the other person's consent if the pecuniary loss is at least \$5,000 commits arson, a Class B felony. [The offense is a Class A felony if it results in either bodily injury, or serious bodily injury to any other person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. damaged
4. property of another person, (*name*)
5. by means of [fire] [explosive]
6. without his/her consent and
7. the pecuniary loss was at least \$5,000
8. (*for Class A felony*) and it resulted in bodily injury/serious bodily injury to (*name person alleged to have been injured*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of arson, a Class A/B felony, as charged in Count \_\_\_\_\_.



**Comment**

The terms "bodily injury," "property," and "serious bodily injury" are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-23 and I.C. 35-41-1-25; Instruction Nos. 14.13, 14.165 and 14.185.

**Instruction No. 4.01(d). Arson (Structure Used for Religious Worship).**

**I.C. 35-43-1-1(a)(4).**

The crime of arson is defined by law as follows:

A person who, by means of [fire] [explosive], [knowingly] [intentionally] damages a structure used for religious worship without the consent of the owner of the structure commits arson, a Class B felony. [The offense is a Class A felony if it results in either bodily injury or serious bodily injury to any other person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. damaged
4. a structure used for religious worship
5. by means of [fire] [explosive]
6. without the consent of the owner of the structure
7. (for Class A felony) and it resulted in bodily injury/serious bodily injury to (name person alleged to have been injured)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of arson, a Class A/B felony, as charged in Count \_\_\_\_\_.



**Comment**

The terms "bodily injury," "property," and "serious bodily injury" are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-23 and I.C. 35-41-1-25; Instruction Nos. 14.13, 14.165 and 14.185.

**Instruction No. 4.03. Arson (For Hire).****I.C. 35-43-1-1(b).**

The crime of arson is defined by law as follows:

A person who, by means of [fire] [explosive], [knowingly] [intentionally] damages property of any person for hire commits arson for hire, a Class B felony. [The offense is a Class A felony if it results in bodily injury to any other person.]

Before you may convict the Defendant, the State must have proved each of the following elements:

1. The Defendant
2. knowingly or intentionally
3. damaged property of (*name*)
4. by means of [fire] [explosive]
5. for hire
6. (*for Class A felony*) and it resulted in bodily injury to (*name person alleged to have been injured*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of arson, a Class A/B felony, as charged in Count \_\_\_\_\_.



**Comments**

The terms "bodily injury" and "property" are defined by law. See I.C. 35-41-1-4 and I.C. 35-41-1-23; Instruction Nos. 14.13 and 14.165.

**Instruction No. 4.05. Arson (Intent to Defraud).****I.C. 35-43-1-1(c).**

The crime of arson is defined by law as follows:

A person who, by means of [fire] [explosive], [knowingly] [intentionally] damages property of any person with intent to defraud, commits arson, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. by means of [fire] [explosive]
4. damaged property of *(name)*
5. with intent to defraud *(name person alleged as fraud target)*.

If the State failed to prove each of these elements beyond a reasonable doubt, then you must find the Defendant not guilty of arson, a Class C felony, as charged in Count \_\_\_\_\_.



**Comments**

The term "property" is defined by law. See I.C. 35-41-1-23; Instruction No. 14.165.

**Instruction No. 4.07. Arson (Property Damage \$250 to \$5,000).****I.C. 35-43-1-1(d).**

The crime of arson is defined by law as follows:

A person who, by means of [fire] [explosive], [knowingly] [intentionally] damages property of any person without his consent so that the resulting pecuniary loss is at least \$250 but less than \$5,000 commits arson, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. by means of [fire] [explosive]
4. damaged property of (name)
5. without his/her consent
6. resulting in pecuniary loss of at least \$250 but less than \$5,000.

If the State failed to prove each of these elements beyond a reasonable doubt, then you must find the Defendant not guilty of arson, a Class D felony, as charged in Count \_\_\_\_\_.



**Comments**

The term "property" is defined by law. See I.C. 35-41-1-23; Instruction No. 14.165.

**Instruction No. 4.09(a). Criminal Mischief — Damaging Property (B misdemeanor).****I.C. 35-43-1-2(a)(1).**

The crime of criminal mischief, a Class B misdemeanor, is defined by law as follows:

A person who [recklessly] [knowingly] [intentionally] damages property of another person without the other person's consent commits criminal mischief, a Class B misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. damaged the property of (name)
4. without the consent of (name).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal mischief, a Class B misdemeanor, as charged in Count \_\_\_\_\_.



**Comment**

The term "property" is defined by law. *See* I.C. 35-41-1-23; Instruction No. 14.165.

**Instruction No. 4.09(b). Criminal Mischief — Damaging Property (A Misdemeanor).**

**I.C. 35-43-1-2(a)(1)(A).**

The crime of criminal mischief, a Class A misdemeanor, is defined by law as follows:

A person who [recklessly] [knowingly] [intentionally] [damages] [defaces] property of another person without the other person's consent commits criminal mischief, a Class B misdemeanor. (The offense is a Class A misdemeanor if [the pecuniary loss is at least \$250 but less than \$2,500] [the property damaged was a moving motor vehicle] [the property damaged contained data relating to a person required to register as a sex offender under I.C. 11-8-8, and the person (is not a sex offender) (was not required to register as a sex offender)], [the property damaged was (a car) (equipment of) a railroad company being operated on a railroad right of way] [the (property damage) (defacement) was caused by (paint) (other markings)].)

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly], [knowingly], or [intentionally]
3. [damaged] or [defaced] the property of (*name*)
4. without the consent of (*name*)
5. (*for Class A misdemeanor*) [the pecuniary loss was at least \$250 but less than \$2,500]

[or]

[the property damaged contained data relating to (*name person*), who was required to register as a sex offender, and the Defendant was not a sex offender or was not required to register as a sex offender]

[or]

[the property damaged was a moving motor vehicle]

[or]

[the property damaged was (a car) (equipment of) a railroad company being operated on a railroad right of way]

[or]

[the (property damage) (defacement) was caused by (paint) (\_\_\_\_\_  
{*describe other markings*} )].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal mischief, a Class B/A misdemeanor, as charged in Count \_\_\_\_\_.

**Comment**

The term "property" is defined by law. See I.C. 35-41-1-23; Instruction No. 14.165.



**Instruction No. 4.09(c). Criminal Mischief — Damaging Property (D felony).****I.C. 35-43-1-2(a)(1)(B).**

The crime of criminal mischief, a Class D felony, is defined by law as follows:

A person who [recklessly] [knowingly] [intentionally] [damages] [defaces] property of another person without the other person's consent commits criminal mischief, a Class B misdemeanor. (The offense is a Class D felony if [the pecuniary loss is at least \$2,500] [the damage causes substantial interruption or impairment of utility service rendered to the public] [the damage is to a public record] [the property damaged contained data relating to a person required to register as a sex offender under IC 11-8-8 and the person is a sex or violent offender or was required to register as a sex or violent offender]) [the damage causes substantial interruption or impairment of work conducted in a scientific research facility] [the damage is to a law enforcement animal].)

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. [damaged] [defaced] the property of (*name*)
4. without the consent of (*name*) and
5. [the pecuniary loss was at least \$2,500]

[or]

[the damage caused substantial (interruption) (impairment) of utility service rendered to the public (*describe service*)]

[or]

[the damage was to a public record (*describe record*)]

[or]

[the property damaged contained data relating to a person required to register as a sex or violent offender, and the Defendant was a sex or violent offender or was required to register as a sex or violent offender]

[or]

[the damage caused substantial interruption or impairment of work conducted in a scientific research facility]

[or]

[the damage was to a law enforcement animal].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal mischief, a Class D felony, as charged in Count \_\_\_\_\_.

**Comment**

The terms "property" and "scientific research facility" are defined by law. See

I.C. 35-41-1-23 and I.C. 35-41-1-24.8; Instruction Nos. 14.165 and 14.184.

The term "sex or violent offender" is defined in I.C. 11-8-8-5.



**Instruction No. 4.11(a). Criminal Mischief — By Deception (B misdemeanor).****I.C. 35-43-1-2(a)(2).**

The crime of criminal mischief, a Class B misdemeanor, is defined by law as follows:

A person who [knowingly] [intentionally] causes another to suffer pecuniary loss by deception commits criminal mischief, a Class B misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. caused (*name*) to suffer a pecuniary loss
4. by (*describe the deception*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal mischief, a Class B misdemeanor, as charged in Count \_\_\_\_\_.

**Instruction No. 4.11(b). Criminal Mischief — By Deception (A misdemeanor).**

**I.C. 35-43-1-2(a)(2)(A).**

The crime of criminal mischief, a Class A misdemeanor, is defined by law as follows:

A person who [knowingly] [intentionally] causes another to suffer pecuniary loss by deception commits criminal mischief. (The offense is a Class A misdemeanor if [the pecuniary loss is at least \$250 but less than \$2500] [the property damaged was a moving motor vehicle] [the property (damaged) (defaced) was a copy of the sex and violent offender directory] [ the property damaged was (a car) (equipment of) a railroad company being operated on a railroad right of way] [the (property damage) (defacement) was caused by (paint) (other markings)].)

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. caused (*name*) to suffer a pecuniary loss
4. by (describe the deception) and
5. [the pecuniary loss was at least \$250 but less than \$2,500]

[or]

[the property (damaged) (defaced) was a copy of the sex and violent offender directory]

[or]

[the property damaged was a moving motor vehicle]

[or]

[the property damaged was (a car) (equipment of) a railroad company being operated on a railroad right of way]

[or]

[the (property damage) (defacement) was caused by (paint)

(\_\_\_\_\_ {*describe other markings*})].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal mischief, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Comment**

The Committee notes that the most likely elevation of this offense to an A misdemeanor would be due to pecuniary loss, but the other possibilities are listed since they are provided for by statute.



The Committee does not believe it is necessary for the State to allege and prove that the Defendant was *not* a sex offender or was not required to register as a sex offender in a charge under I.C. 35-43-1-2(a)(1) or (2) (A)(iii).

**Instruction No. 4.11(c). Criminal Mischief — By Deception (D felony).****I.C. 35-43-1-2(a)(2)(B).**

The crime of criminal mischief, a Class D felony, is defined by law as follows:

A person who [knowingly], [intentionally] causes another to suffer pecuniary loss by deception commits criminal mischief. The offense is a Class D felony if [the pecuniary loss is at least \$2500] [the damage causes a substantial interruption or impairment of utility service rendered to the public] [the damage is to a public record] [the property (damaged) (defaced) was a copy of the sex and violent offender directory and the person (is a sex or violent offender) (was required to register as a sex or violent offender)] [the damage causes substantial interruption or impairment of work conducted in a scientific research facility] [the damage is to a law enforcement animal].

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. caused (name) to suffer a pecuniary loss
4. by (describe the deception) and
5. [the pecuniary loss was at least \$2,500]

[or]

[the damage caused substantial interruption or impairment of utility service rendered to the public (*describe the service*)]

[or]

[the damage was to a public record (*describe the record*)]

[or]

[the property (damaged) (defaced) was a copy of the sex and violent offender directory, and the Defendant (was a sex offender) (was required to register as a sex offender) at that time]

[or]

[the damage caused substantial interruption or impairment of work conducted in \_\_\_\_\_, a scientific research facility]

[or]

[the damage was to a law enforcement animal].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal mischief, a Class D felony, as charged in Count \_\_\_\_\_.

**Comment**

The Committee notes that the most likely elevation of this offense to a D felony



would be due to pecuniary loss of at least \$2500, but the other possibilities are listed since they are provided for by statute.

See Pattern Instruction 13.27 if instruction on an included offense is applicable.

The terms "property" and "scientific research facility" are defined by law. See I.C. 35-41-1-23 and I.C. 35-41-1-24.8; Instruction Nos. 14.165 and 14.184.

The term "sex or violent offender" is defined in I.C. 11-8-8-5.

**Instruction No. 4.12(a). Criminal mischief — By Threat (B misdemeanor).**

**I.C. 35-43-1-2(a)(2).**

The crime of criminal mischief, a Class B misdemeanor, is defined by law as follows:

A person who [knowingly] [intentionally] causes another to suffer pecuniary loss by an expression of intention to [injure another person] [damage the property or impair the rights of another person] commits criminal mischief, a Class B misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. caused (*name*) to suffer a pecuniary loss
4. by (*describe the threat to injure another person, damage the property of another person, or to impair the rights of another person*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal mischief, a Class B misdemeanor, as charged in Count \_\_\_\_\_.



**Instruction No. 4.12(b). Criminal mischief — By Threat (A misdemeanor).****I.C. 35-43-1-2(a)(2)(A).**

The crime of criminal mischief, a Class A misdemeanor, is defined by law as follows:

A person who [knowingly] [intentionally] causes another to suffer pecuniary loss by an expression of intention to [injure another person] [damage the property or impair the rights of another person] commits criminal mischief. [The offense is a Class A misdemeanor if [the pecuniary loss is at least \$250 but less than \$2500] [the property damaged was a moving motor vehicle] [the property (damaged) (defaced) was a copy of the sex and violent offender directory] [the property damaged was (a car) (equipment of) a railroad company being operated on a railroad right of way] [the (property damage) (defacement) was caused by (paint) (other markings)].

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. caused (*name*) to suffer a pecuniary loss
4. by (describe the threat to injure another person, damage the property of another person, or to impair the rights of another person) and
5. [the pecuniary loss was at least \$250 but less than \$2,500]

[or]

[the property (damaged) (defaced) was a copy of the sex and violent offender directory]

[or]

[the property damaged was a moving motor vehicle]

[or]

[the property damaged was (a car) (equipment of) a railroad company being operated on a railroad right of way]

[or]

[the (property damage) (defacement) was caused by (paint)

(\_\_\_\_\_ {*describe other markings*} )]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal mischief, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Comment**

The Committee notes that the most likely elevation of this offense to an A

misdemeanor would be due to pecuniary loss, but the other possibilities are listed since they are provided for by statute.

The Committee does not believe it is necessary for the State to allege and prove that the Defendant was *not* a sex offender or was not required to register as a sex offender in a charge under I.C. 35-43-1-2(a)(1) or (2) (A)(iii).



**Instruction No. 4.12(c). Criminal Mischief — By Threat (D felony).****I.C. 35-43-1-2(a)(2)(B).**

The crime of criminal mischief, a Class D felony, is defined by law as follows:

A person who [knowingly] [intentionally] causes another to suffer pecuniary loss by an expression of intention to [injure another person] [damage the property or impair the rights of another person] commits criminal mischief. [The offense is a Class D felony if (the pecuniary loss is at least \$2500) (the damage causes a substantial interruption or impairment of utility service rendered to the public) (the damage is to a public record) (the property [damaged] [defaced] was a copy of the sex and violent offender directory and the person [is a sex offender] [was required to register as a sex offender]) (the damage causes substantial interruption or impairment of work conducted in a scientific research facility) (the damage is to a law enforcement animal).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. caused (*name*) to suffer a pecuniary loss
4. by (*describe the threat to injure another person, damage the property of another person, or to impair the rights of another person*) and
5. [the pecuniary loss was at least \$2,500]

[or]

[the damage caused substantial interruption or impairment of utility service rendered to the public (*describe the service*)]

[or]

[the damage was to a public record (*describe the record*)]

[or]

[the property (damaged) (defaced) was a copy of the sex and violent offender directory and the person (was a sex offender) (was required to register as a sex offender) at that time]

[or]

[the damage caused substantial interruption or impairment of work conducted in \_\_\_\_\_, a scientific research facility]

[or]

[the damage was to a law enforcement animal].

If the State failed to prove each of these elements beyond a reasonable doubt, you

must find the Defendant not guilty of criminal mischief, a Class D felony, as charged in Count \_\_\_\_\_.

**Comment**

The Committee notes that the most likely elevation of this offense to a D felony would be due to pecuniary loss of at least \$2500, but the other possibilities are listed since they are provided for by statute.

See Pattern Instruction 13.27 if instruction on an included offense is applicable.

The terms “law enforcement animal,” “property” and “scientific research facility” are defined by law. See I.C. 35-46-3-4.5, I.C. 35-41-1-23 and I.C. 35-41-1-24.8; Instruction Nos. 14.122, 14.165 and 14.184.

The term “sex or violent offender” is defined in I.C. 11-8-8-5.



**Instruction No. 4.13(a). Institutional Criminal mischief — A Misdemeanor.****I.C. 35-43-1-2(b).**

The crime of institutional criminal mischief, is defined by law as follows:

A person who [recklessly] [knowingly] [intentionally] damages [a structure used for religious worship] [the grounds adjacent to and owned or rented in common with a structure used for religious worship] [personal property contained in a structure used for religious worship] [a (school) (community center)] [the grounds adjacent to and owned or rented in common with a (school) (community center)] [personal property contained in a (school) (community center)] without the consent of the [owner] [possessor] [occupant] of the property that is damaged, commits institutional criminal mischief, a Class A misdemeanor. [The offense is (a Class D felony if the pecuniary loss is at least \$250 but less than \$2,500) (a Class C felony if the pecuniary loss is at least \$2,500).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. damaged
4. [a structure used for religious worship]  
[or]  
[the grounds adjacent to and owned or rented in common with a structure used for religious worship]  
[or]  
[personal property contained in a structure used for religious worship]  
[or]  
[a (school) (community center)]  
[or]  
[the grounds adjacent to and owned or rented in common with a (school) (community center)]  
[or]  
[personal property contained in a (school) (community center)]
5. without the consent of (*name*), the [owner] [possessor] [occupant] of the property
6. (*for Class D felony*) and the pecuniary loss was at least \$250]
7. (*for Class C felony*) and the pecuniary loss was at least \$2500].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of institutional criminal mischief, a Class A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.



**Instruction No. 4.14(a). Cemetery Mischief.****I.C. 35-43-1-2.1.**

The crime of cemetery mischief is defined by law as follows:

A person who [recklessly] [knowingly] [intentionally] [damages a cemetery or a facility used for memorializing the dead] [damages the grounds owned or rented by a cemetery or facility used for memorializing the dead] commits cemetery mischief, a Class A misdemeanor. [The offense is a Class D felony if the pecuniary loss is at least two thousand five hundred dollars (\$2,500).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. damaged
4. [a cemetery or facility used for memorializing the dead]  
[the grounds (owned) (rented) by a cemetery or facility used for memorializing the dead]
- [5. (*for Class D felony*) and the pecuniary loss was at least two thousand five hundred dollars (\$2500)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of cemetery mischief, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

*(Text continued on page 4-37)*

1. The first part of the document is a letter from the President of the United States to the Congress, dated 1789. It is a very important document, as it is the first time that the President has addressed the Congress. In this letter, the President discusses the state of the Union and the challenges that the new government is facing. He also discusses the importance of the Constitution and the role of the President in enforcing it.

2. The second part of the document is a report from the Secretary of the Treasury, dated 1790. It is a very important document, as it is the first time that the Secretary of the Treasury has reported to the Congress. In this report, the Secretary discusses the state of the Treasury and the challenges that the new government is facing. He also discusses the importance of the Constitution and the role of the Secretary in enforcing it.

3. The third part of the document is a report from the Secretary of the Navy, dated 1791. It is a very important document, as it is the first time that the Secretary of the Navy has reported to the Congress. In this report, the Secretary discusses the state of the Navy and the challenges that the new government is facing. He also discusses the importance of the Constitution and the role of the Secretary in enforcing it.

4. The fourth part of the document is a report from the Secretary of the War, dated 1792. It is a very important document, as it is the first time that the Secretary of the War has reported to the Congress. In this report, the Secretary discusses the state of the War and the challenges that the new government is facing. He also discusses the importance of the Constitution and the role of the Secretary in enforcing it.

5. The fifth part of the document is a report from the Secretary of the Interior, dated 1793. It is a very important document, as it is the first time that the Secretary of the Interior has reported to the Congress. In this report, the Secretary discusses the state of the Interior and the challenges that the new government is facing. He also discusses the importance of the Constitution and the role of the Secretary in enforcing it.



**Comment**

I.C. 35-43-1-2.1 provides for a number of exceptions to liability for damage to a cemetery, primarily for the cemetery measures authorized by the article on cemeteries in I.C. 23-14. The burden is on the Defendant to plead and provide an exception. See *Day v. State*, 251 Ind. 399, 241 N.E.2d 357 (1968); *Gilbert v. State*, 426 N.E.2d 1333 (Ind. Ct. App. 1981).

**Instruction No. 4.14(b). Damage to Cemetery Monuments or Grave Markers.****I.C. 35-43-1-2.1.**

The crime of damage to grave markers is defined by law as follows:

A person who [recklessly] [knowingly] [intentionally] [disturbs] [defaces][damages] a [cemetery monument] [grave marker] [grave artifact] [grave ornamentation][cemetery enclosure] commits cemetery mischief, a Class A misdemeanor. [The offense is a Class D felony if the pecuniary loss is at least two thousand five hundred dollars (\$2,500).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. [disturbed] [defaced] [damaged] a
4. [cemetery monument]
  - [or]
  - [grave marker]
  - [or]
  - [grave artifact]
  - [or]
  - [grave ornamentation]
  - [or]
  - [cemetery enclosure]
5. (for Class D felony) and the pecuniary loss was at least two thousand five hundred dollars (\$2500)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of damage to cemetery markers or monuments, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.



**Comment**

I.C. 35-43-1-2.1 provides for a number of exceptions to liability for damage to a cemetery, primarily for the cemetery measures authorized by the article on cemeteries in I.C. 23-14. The burden is on the Defendant to plead and provide an exception. See *Day v. State*, 251 Ind. 399, 241 N.E.2d 357 (1968); *Gilbert v. State*, 426 N.E.2d 1333 (Ind. Ct. App. 1981).

**Instruction No. 4.15. Computer Tampering.****I.C. 35-43-1-4.**

The crime of computer tampering is defined by law as follows:

A person who [knowingly] [intentionally] [alters] [damages] [a computer program] [data which comprises a part of a computer system or computer network] without the consent of the owner of a computer system or computer network commits computer tampering, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following :

1. The Defendant
2. [knowingly] [intentionally]
3. [altered] [damaged]
4. [a computer program]  
[data which comprised a part of a computer system or computer network]
5. without the consent of the owner of the computer system or computer network.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of computer tampering, a Class D felony, as charged in Count \_\_\_\_\_.



**Comments**

The terms "data," "computer network," "computer system," and "computer program" are defined by law. See I.C. 35-43-1-4; Instruction Nos. 14.45, 14.21 and 14.23.

**Instruction No. 4.17. Burglary.****I.C. 35-43-2-1.**

The crime of burglary is defined by law as follows:

A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony. [The offense is a Class B felony (if it is committed while armed with a deadly weapon) (if the building or structure is a [dwelling] [a structure used for religious worship].) [The offense is a Class A felony if it results in either bodily injury or serious bodily injury to any other person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. broke and entered
4. the building or structure of (*name*)
5. with the intent to commit a felony, [*name felony*], in it, by [*set out elements of object felony*]
- [6. (*for Class B felony*) and [the offense was committed while Defendant was armed with (*specify weapon*), a deadly weapon]
- [or]
- [the building or structure was a dwelling]
- [or]
- [the building or structure was used for religious worship]
- [7. (*for Class A felony*) and the offense resulted in (bodily injury) (serious bodily injury) to (*name*).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of burglary, a Class C/B/A felony, as charged in Count \_\_\_\_\_.



**Comments**

The Committee recommends that the jury be instructed that the offense must have been committed "knowingly" or "intentionally." The Committee believes that this is the *mens rea* element held to be implicit in the burglary statute by *Gregory v. State* (1973), 259 Ind. 62, 291 N.E.2d 67. See also W. LaFare and A. Scott, 1 *Substantive Criminal Law* § 3.05, p. 303 (West 1986).

The terms "bodily injury," "deadly weapon," "dwelling," and "serious bodily injury" are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-8, I.C. 35-41-1-10 and I.C. 35-41-1-25; Instruction Nos. 14.13, 14.49, 14.75 and 14.185.

**Instruction No. 4.18. Residential Entry.****I.C. 35-43-2-1.5.**

The crime of residential entry is defined by law as follows:

A person who [knowingly] [intentionally] breaks and enters the dwelling of another person commits residential entry, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. broke and entered
4. the dwelling of [name].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of residential entry, a Class D felony, as charged in Count \_\_\_\_\_.



**Comments**

The term “dwelling” is defined by law. *See* I.C. 35-41-1-20; Instruction No. 14.75.

**Instruction No. 4.19. Criminal Trespass (Entering Real Property).****I.C. 35-43-2-2(a)(1).**

The crime of criminal trespass is defined by law as follows:

A person who, not having a contractual interest in the property, [knowingly] [intentionally] enters the real property of another person after having been denied entry by the other person or his agent commits criminal trespass, a Class A misdemeanor. [The offense is a Class D felony if it is committed (on a scientific research facility) (on school property) (on a school bus) (on a key facility) (on a facility belonging to a public utility as defined in IC 32-24-1-5.9(a)).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when he/she did not have a contractual interest in the real property of [name]
3. [knowingly] [intentionally]
4. entered the real property of [name]
5. [after having been denied entry by (name)]  
[or]  
[after having been denied entry by the agent of (name)]
- [6. (for D felony) and the offense was committed  
(on a scientific research facility)  
(or)  
(on school property)  
(or)  
(on a school bus)  
(or)  
(on a key facility)  
(or)  
(on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a)))].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal trespass (entering real property), a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_

**Comments**

The terms “denied entry,” “key facility,” “school bus,” “school property” and “scientific research facility” are defined by law. See I.C. 35-41-2-2(b), I.C. 35-41-1-16.5, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-24.8; Instruction



Nos. 14.53, 14.119.3, 14.181, 14.183 and 14.184.

Trial of criminal trespass as a Class D felony due to a prior unrelated conviction concerning the same property must be bifurcated. See Chapter 15.

**Instruction No. 4.21. Criminal Trespass (Refusing to Leave Real Property).****I.C. 35-43-2-2(a)(2).**

The crime of criminal trespass is defined by law as follows:

A person who, not having a contractual interest in the property, [knowingly] [intentionally] refuses to leave the real property of another person after having been asked to leave by the other person or his agent commits criminal trespass, a Class A misdemeanor. [The offense is a Class D felony if it is committed (on a scientific research facility) (on school property) (on a school bus) (on a key facility) (on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a))).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when he/she did not have a contractual interest in the real property of [name]
3. [knowingly] [intentionally]
4. refused to leave the real property of [name]
5. after having been asked to leave by [name] [by the agent of (name)]
- [6. (for D felony) and the offense was committed  
(on a scientific research facility)  
(or)  
(on school property)  
(or)  
(on a school bus)  
(or)  
(on a key facility)  
(or)  
(on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a))).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal trespass, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms “key facility,” “school bus,” “school property” and “scientific research facility” are defined by law. See I.C. 35-41-1-16.5, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7 and I.C. 35-41-1-24.8; Instruction Nos. 114.119.3, 14.181, 14.183 and 14.184.

Trial of criminal trespass as a Class D felony due to a prior unrelated conviction



concerning the same property must be bifurcated. See Chapter 15.

**Instruction No. 4.23. Criminal Trespass (Vehicles).****I.C. 35-43-2-2(a)(3).**

The crime of criminal trespass is defined by law as follows:

A person who accompanies another person in a vehicle, with knowledge that the other person knowingly or intentionally is exerting unauthorized control over the vehicle, commits criminal trespass, a Class A misdemeanor. [The offense is a Class D felony if it is committed (on a scientific research facility) (on school property) (on a school bus) (on a key facility) (on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a))).]

Before you may convict the Defendant, the State must have proved each of the following elements:

1. The Defendant
2. accompanied [*name other person*] in a vehicle
3. when Defendant knew that [*name other person*] was knowingly or intentionally exerting unauthorized control over the vehicle
4. [*for D felony*] and the offense was committed  
(on a scientific research facility)  
(or)  
(on school property)  
(or)  
(on a school bus)  
(or)  
(on a key facility)  
(or)  
(on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a))).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal trespass, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms “key facility,” “school bus,” “school property” and “scientific research facility” are defined by law. See I.C. 35-41-1-16.5, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7 and I.C. 35-41-1-24.8; Instruction Nos. 114.119.3, 14.181, 14.183 and 14.184.

Trial of criminal trespass as a Class D felony due to a prior unrelated conviction concerning the same property must be bifurcated. See Chapter 15.



**Instruction No. 4.25. Criminal Trespass (Interfering with Possession of Property.**

**I.C. 35-43-2-2(a)(4).**

The crime of criminal trespass is defined by law as follows:

A person who [knowingly] [intentionally] interferes with the [possession] [use] of the property of another person without his consent, commits criminal trespass, a Class A misdemeanor. [The offense is a Class D felony if it is committed (on a scientific research facility) (on school property) (on a school bus) (on a key facility) (on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a))).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. interfered with the [possession] [use] of the property of [name]
4. without the consent of [name]
5. (for D felony) and the offense was committed

(on a scientific research facility)

(or)

(on school property)

(or)

(on a school bus)

(or)

(on a key facility)

(or)

(on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a))).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Criminal Trespass, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms “key facility,” “property,” “school bus,” “school property” and “scientific research facility” are defined by law. See I.C. 35-41-1-16.5, I.C. 35-41-1-23, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7 and I.C. 35-41-1-24.8; Instruction Nos. 14.119.3, 14.165, 14.181, 14.183 and 14.184.

Trial of criminal trespass as a Class D felony due to a prior unrelated conviction concerning the same property must be bifurcated. See Chapter 15.

**Instruction No. 4.27. Criminal Trespass (Entering a Dwelling Without Consent).****I.C. 35-43-2-2(a)(4).**

The crime of criminal trespass is defined by law as follows:

A person who, not having a contractual interest in the property, [knowingly] [intentionally] enters the dwelling of another person without the other person's consent, commits criminal trespass, a Class A misdemeanor. [The offense is a Class D felony if it is committed (on a scientific research facility) (on school property) (on a school bus) (on a key facility) (on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a)).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. entered the dwelling of [name]
4. without the consent of [name]
5. when Defendant had no contractual interest in the property entered
- [6. (for D felony) and the offense was committed  
(on a scientific research facility)  
(or)  
(on school property)  
(or)  
(on a school bus)  
(or)  
(on a key facility)  
(or)  
(on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a))).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Criminal Trespass, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms "dwelling," "key facility," "property," "school bus," "school property" and "scientific research facility" are defined by law. See I.C. 35-41-1-10, I.C. 35-41-1-16.5, I.C. 35-41-1-23, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7 and



I.C. 35-41-1-24.8; Instruction Nos. 14.75, 14.119.3, 14.165, 14.181, 14.183 and 14.184.

Trial of criminal trespass as a Class D felony due to a prior unrelated conviction concerning the same property must be bifurcated. See Chapter 15.

**Instruction No. 4.27a. Criminal Trespass (Train Travel Without Consent).**

**I.C. 35-43-2-2(a)(4).**

The crime of criminal trespass is defined by law as follows:

A person who [knowingly] [intentionally] travels by train without lawful authority or the railroad carrier's consent, and rides on the outside of a train or inside a passenger car, locomotive, or freight car, including a boxcar, flatbed, or container without lawful authority or the railroad carrier's consent commits criminal trespass, a Class A misdemeanor. [The offense is a Class D felony if it is committed (on a scientific research facility) (on school property) (on a school bus) (on a key facility) (on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a)).

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant

2. [knowingly] [intentionally]

3. travelled by train

[without the consent of *[name railroad carrier]*

[or]

[without lawful authority]

4. and rode

[on the outside of the train]

[or]

[inside a (passenger car) (locomotive)

(freight car, including a {box car} {flatbed} {container})

[without lawful authority]

[or]

[without the carrier's consent]

[5. (*for D felony*) and the offense was committed

(on a scientific research facility)

(or)

(on school property)

(or)

(on a school bus)

(or)



(on a key facility)

(or)

(on a facility belonging to a public utility (as defined in IC 32-24-1-5.9(a))).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Criminal Trespass, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

### Comments

The terms “key facility,” “school bus,” “school property” and “scientific research facility” are defined by law. See I.C. 35-41-1-16.5, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7 and I.C. 35-41-1-24.8; Instruction 14.119.3, 14.181, 14.183 and 14.184.

See the statute for a list of exceptions to liability. The Committee believes that the burden to prove one of these exceptions rests on the Defendant. *See Gilbert v. State* 426 N.E.2d 1333 Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982).

Trial of criminal trespass as a Class D felony due to a prior unrelated conviction concerning the same property must be bifurcated. See Chapter 15, Instruction No. 15.42.

## Instruction No. 4.28(a). Railroad Mischief — Signal Systems.

## I.C. 35-42-2-5.5.

The crime of railroad mischief is defined by law as follows:

A person who [recklessly] [knowingly] [intentionally] [removes an appurtenance from a railroad signal system, resulting in damage or impairment of the operation of the railroad signal system (including a (train control system) (centralized dispatching system) (highway-railroad grade crossing warning signal) on a railroad owned, leased, or operated by a railroad carrier without consent of the railroad carrier involved commits railroad mischief, a Class D felony. [The offense is a Class C felony if it results in serious bodily injury to another person.] [The offense is a Class B felony if it results in the death of another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. removed [*describe item removed*], which was an appurtenance from a railroad signal system, and
4. the removal of the [*describe item removed*] resulted in damage or impairment of the railroad signal system (including a [train control system] [centralized dispatching system] [highway-railroad grade crossing warning signal]
5. on a railroad owned, leased, or operated by [*name*], a railroad carrier
6. without the consent of [*name*], the railroad carrier involved]
- [7. (*for Class C felony*) and the offense resulted in serious bodily injury to [*name*], another person]
- [8. (*for Class B felony*) and the offense resulted in the death of [*name*], another person].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of railroad mischief, a Class D/C/B felony, as charged in Count \_\_\_\_\_.



**Instruction No. 4.28(b). Railroad Mischief — Rail Systems****I.C. 35-42-2-5.5.**

The crime of railroad mischief is defined by law as follows:

A person who [recklessly] [knowingly] [intentionally] [tampers with][obstructs] (a switch) (a frog) (a rail) (a roadbed) (a crosstie) (a viaduct) (a bridge) (a trestle) (a culvert) (an embankment) (a structure) (an appliance) pertaining to or connected with a railroad carrier without consent of the railroad carrier involved commits railroad mischief, a Class D felony. [The offense is a Class C felony if it results in serious bodily injury to another person.] [The offense is a Class B felony if it results in the death of another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. [tampered with] [obstructed]
4. [a switch]  
[or]  
[a frog]  
[or]  
[a rail)]  
[or]  
[a roadbed]  
[or]  
[a crosstie]  
[or]  
[a viaduct]  
[or]  
[a bridge]  
[or]  
[a trestle]  
[or]  
[a culvert]  
[or]

[an embankment]

[or]

[a structure]

[or]

[an appliance]

5. pertaining to or connected with a railroad carrier]

6. without the consent of the railroad carrier involved

[7. (for Class C felony) and the offense resulted in serious bodily injury to another person]

[8. (for Class B felony) the offense resulted in the death of another person].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of railroad mischief, a Class D/C/B felony, as charged in Count \_\_\_\_\_.



**Instruction No. 4.28(c). Railroad Mischief — Locomotive and Cars****I.C. 35-42-2-5.5.**

The crime of railroad mischief is defined by law as follows:

A person who [recklessly] [knowingly] [intentionally] [steals] [removes] [alters] [interferes with] (a journal bearing) (a brass) (a waste) (a packing) (a triple valve) (a pressure cock) (a brake) (an air hose) (another part of the operating mechanism of) (a locomotive) (an engine) (a tender) (a coach) (a car) (a caboose) (a motor car) used or capable of being used by a railroad carrier in Indiana without consent of the railroad carrier commits railroad mischief, a Class D felony. [The offense is a Class C felony if it results in serious bodily injury to another person.] [The offense is a Class B felony if it results in the death of another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. [stole] [removed] [altered] [interfered with]
4. [a journal bearing]

[or]

[a brass]

[or]

[a waste]

[or]

[a packing]

[or]

[a triple valve]

[or]

[a pressure cock]

[or]

[a brake]

[or]

[an air hose]

[or]

[another part of the operating mechanism]

5. [of a locomotive]

[or] \_\_\_\_\_

[of an engine]

[or]

[of a tender]

[or]

[of a coach]

[or]

[of a car] \_\_\_\_\_

[or]

[of a caboose]

[or]

[of a motor car]

6. [used] [capable of being used] by a railroad carrier in Indiana

7. without the consent of the railroad carrier

[8. (*for Class C felony*) and the offense resulted in serious bodily injury to another person]

[9. (*for Class D felony*) and the offense resulted in the death of another person].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of railroad mischief, a Class D/C/B felony, as charged in Count \_\_\_\_\_.



**Instruction No. 4.29. Computer Trespass.****I.C. 35-43-2-3.**

The crime of computer trespass is defined by law as follows:

A person who knowingly] [intentionally] accesses a [computer system] [a computer network] [any part of a computer (system) (network)] without the consent of [the owner of the (computer system) (computer network)] [the owner's licensee] commits computer trespass, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. accessed
4. [a computer system]  
[or]  
[a computer network]  
[or]  
[any part of a computer system or a computer network]
6. without the consent of [(name), its owner] [(name), the licensee of (name), its owner].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of computer trespass, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Comments**

The terms "access," "computer system," and "computer network" are defined by law. See I.C. 35-43-2-3; Instruction Nos. 14.01 and 14.19.

## Instruction No. 4.31. Theft.

## I.C. 35-43-4-2.

The crime of theft is defined by law as follows:

A person who [knowingly] [intentionally] exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony. [The offense is a Class C felony if the fair market value of the property is at least \$100,000.] [The offense is a Class C felony if the property that is the subject of the theft is a valuable metal and [relates to transportation safety] [relates to public safety] [is taken from a (hospital or other health care facility) (public utility {as defined in IC 32-24-1-5.9(a)}) (key facility)] and the absence of the property creates a substantial risk of bodily injury to a person.]

1. The Defendant
2. [knowingly] [intentionally]
3. exerted unauthorized control
4. over the property of (*name*)
5. with intent to deprive (*name*) of any part of its value or use
- [6. and the fair market value was at least \$100,000]

[or]

- [6. and the subject of the theft was a valuable metal and

(related to transportation safety)

(or)

(related to public safety)

(or)

(was taken from:

{a hospital or other health care facility}

{or}

{a public utility (as defined in IC 32-24-1-5.9(a))}

{or}

{a key facility}

and the absence of the property created a substantial risk of bodily injury to a person.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of theft, a Class D/C felony, as charged in Count

### Comments

The terms “exert control over property,” “key facility,” “property,” “unautho-



rized control over property,” and “valuable metal” are defined by law. See I.C. 35-43-4-1(a), I.C. 35-41-1-16.5, I.C. 35-41-1-23, I.C. 35-43-4-1(b), I.C. 25-37.5-1-1; Instruction Nos. 14.81, 14.119.3, 14.165, 14.209, and 14.125.10.

For a defense instruction as to possession of property, see Basis of Liability, Voluntary Conduct — Possession of Property, Instruction No. 9.05.

**Instruction No. 4.33. Criminal Conversion.**

**I.C. 35-43-4-3.**

The crime of criminal conversion is defined by law as follows:

A person who [knowingly] [intentionally] exerts unauthorized control over property of another person commits criminal conversion, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. exerted unauthorized control
4. over property of [name].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal conversion, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Comments**

The terms “exert control over property,” “property” and “unauthorized control over property” are defined by law. *See* I.C. 35-43-4-1(a), I.C. 35-41-1-23 and I.C. 35-43-4-1(b); Instruction Nos. 14.81, 14.165 and 14.209.



**Instruction No. 4.33.1 Criminal Conversion — Motor Vehicle for Crime.****I.C. 35-43-4-3.**

The crime of criminal conversion is defined by law as follows:

A person who [knowingly] [intentionally] exerts unauthorized control over the motor vehicle of another person with the intent to use the motor vehicle to assist the person in the commission of a crime commits criminal conversion, a Class D felony. [The offense is a Class C felony if committed by a person who exerts unauthorized control over the motor vehicle of another person and the person uses the motor vehicle to assist the person in the commission of a felony.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
  2. [knowingly] [intentionally]
  3. exerted unauthorized control
  4. over the motor vehicle of [name]
  5. [with the intent to use the motor vehicle to assist the Defendant in committing the crime of (*name alleged crime*), which is defined as (*provide a definition of the alleged crime*)]
- [or]
5. [and the Defendant used the motor vehicle to assist the Defendant in committing the felony of (*name alleged felony*), which is defined as (*provide a definition of the alleged felony*)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal conversion, a Class D/C felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms “exert control over property,” “motor vehicle,” and “unauthorized control over property” are defined by law. See I.C. 35-43-4-1(a), I.C. 9-13-2-105, and I.C. 35-43-4-1(b); Instruction Nos. 14.81, 14.137, and 14.209.

**Instruction No. 4.35. Auto Theft.****I.C. 35-43-4-2.5(b).**

The crime of auto theft is defined by law as follows:

A person who [knowingly] [intentionally] exerts unauthorized control over the motor vehicle of another person, with intent to deprive the owner of [any part of the vehicle's value or use] [a component part of the vehicle] commits auto theft, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following elements:

1. The Defendant
2. [knowingly] [intentionally]
3. exerted unauthorized control over the motor vehicle of [name]
4. with the intent to deprive (name), the owner  
[of any part of the vehicle's value or use]  
[of a component part of the vehicle.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of auto theft, a Class D felony, as charged in Count \_\_\_\_\_.

**Comments**

Auto theft is a Class C felony if the Defendant has a prior conviction for auto theft. The trial of the C felony must be bifurcated. *See* the instructions in Chapter 15.

The terms "component part," "exert control over property," "motor vehicle," and "unauthorized control over property" are defined by law. *See* I.C. 9-1-3.6-2, I.C. 35-43-4-1(a), I.C. 9-1-1-2 and I.C. 35-43-4-1(b); Instruction Nos. 14.19, 14.81, 14.137 and 14.209.

For a defense instruction as to possession of property, *see* Basis of Liability, Voluntary Conduct — Possession of Property; Instruction No. 9.05.



**Instruction No. 4.36. Unauthorized Entry of Motor Vehicle.****I.C. 35-43-4-2.7.**

The crime of unauthorized entry of a motor vehicle is defined by law as follows:

A person who enters a motor vehicle knowing that the person does not have permission of [an owner] [a lessee] [a person who is authorized to operate the motor vehicle by an owner or lessee] of the motor vehicle commits unauthorized entry of a motor vehicle, a Class B misdemeanor. [The offense is a Class A misdemeanor if the motor vehicle has (visible steering column damage) (ignition switch alteration) as a result of the entry without permission.] [The offense is a Class D felony if the person occupies the motor vehicle while the motor vehicle is used to further the commission of a crime if the person knew or should have known that a person intended to use the motor vehicle in the commission of a crime.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. entered a motor vehicle
3. when the Defendant knew that [he] [she] did not have permission to enter the motor vehicle from  
[an owner of the motor vehicle]  
[or]  
[a lessee of the motor vehicle]  
[or]  
[a person who was authorized to operate the motor vehicle by an owner or lessee of the motor vehicle]
4. and the motor vehicle had  
(visible steering column damage)  
(or)  
(ignition switch alteration)  
as a result of the Defendant's entry of the motor vehicle]
5. and the Defendant occupied the motor vehicle  
while the motor vehicle was used to further the commission of the crime of  
(*name alleged crime*), which is defined as (*recite elements of alleged crime*)  
and  
when Defendant (knew) (should have known) that (*name person alleged*)  
intended to use the motor vehicle in the commission of a crime.]



If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of unauthorized entry of a motor vehicle, a Class B/A misdemeanor/Class D felony, charged in Count \_\_\_\_\_.

### Comments

The statute provides for the following exceptions to this offense:

This section does not apply to the following:

(1) A public safety officer (as defined in IC 35-47-4.5-3) or state police motor carrier inspector acting within the scope of the officer's or inspector's duties.

(2) A motor vehicle that must be moved because the motor vehicle is abandoned, inoperable, or improperly parked.

(3) An employee or agent of an entity that possesses a valid lien on a motor vehicle who is expressly authorized by the lienholder to repossess the motor vehicle based upon the failure of the owner or lessee of the motor vehicle to abide by the terms and conditions of the loan or lease agreement.

The burden to prove an exemption or exception to a crime has been held to be the Defendant's by a preponderance of the evidence. *See Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). When an exception is raised and supported by evidence, the court must instruct on it. The Committee suggests that the instruction be in the "defense" format used in Instruction No. 7.37.

By statute, "[I]t is a defense to a prosecution under this section that the accused person reasonably believed that the person's entry into the vehicle was necessary to prevent bodily injury or property damage." When the evidence warrants, the court should instruct on this defense. For the appropriate format to use for an instruction on the defense, *see* the Introduction to Chapter 10.

Statute also provides "[t]here is a rebuttable presumption that the person did not have the permission of an owner, a lessee, or an authorized operator of the motor vehicle to enter the motor vehicle if the motor vehicle has visible steering column damage or ignition switch alteration." If there is evidence to support an instruction on this presumption, the Committee suggests the jury be instructed as follows:

You may consider evidence that the motor vehicle had [visible steering column damage] [ignition switch alteration] as raising a presumption that the Defendant did not have the permission of

[an owner of the motor vehicle]

[or]

[a lessee of the motor vehicle]

[or]

[a person who was authorized to operate the motor vehicle by an owner or lessee of the motor vehicle]

to enter the motor vehicle. This presumption is not conclusive. You may accept it



or reject it.

For statutory presumptions like this one, the jury must be instructed that the presumption is permissive. *Hall v. State*, 560 N.E.2d 561 (Ind. Ct. App. 1990); *Thompson v. State*, 646 N.E.2d 687 (Ind. Ct. App. 1995)

The term "motor vehicle" is defined by law. See I.C. 35-43-4-2.7 and I.C. 9-13-2-105; Instruction No. 14.137.

**Instruction No. 4.37. Receiving Stolen Property.****I.C. 35-43-4-2(b).**

The crime of receiving stolen property is defined by law as follows:

A person who[knowingly] [intentionally] [receives] [retains] [disposes of] the property of another person that has been the subject of theft commits receiving stolen property, a Class D felony. [The offense is a Class C felony if the fair market value of the property is at least \$100,000] [The offense is a Class C felony if the property that is the subject of the theft is a valuable metal and [relates to transportation safety] [relates to public safety] [is taken from a (hospital or other health care facility) (public utility {as defined in IC 32-24-1-5.9(a)}) (key facility))] and the absence of the property creates a substantial risk of bodily injury to a person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [received] [retained] [disposed of] (describe property) which was the property of (*name*)
4. when that property had been the subject of theft
5. and when Defendant knew the property had been the subject of a theft
- [6. and the fair market value of the property was at least \$100,000]

[or]

- [6. and the subject of the theft was a valuable metal and

(related to transportation safety)

(or)

(related to public safety)

(or)

(was taken from:

{a hospital or other health care facility}

(or)

{a public utility (as defined in IC 32-24-1-5.9(a))}

(or)

{a key facility}

and the absence of the property created a substantial risk of bodily injury to a person.]

- [7. and when the Defendant's (receiving) (retaining) (disposing of) the property



was not with the purpose of restoring the property to the owner].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of receiving stolen property, a Class D/C felony, as charged in Count \_\_\_\_\_.

### Comments

The terms “key facility,” “property,” and valuable metal are defined by law. See I.C. 35-41-1-16.5, I.C. 35-41-1-23, and I.C. 25-37.5-1-1; Instruction Nos. 14.119.3, 14.165, and 14.215.10.

The addition of the last element — disproving a defense — should only be given as a final instruction and after evidence has been introduced to put the defense in issue.

**Instruction No. 4.39. Receiving Stolen Auto Parts.****I.C. 35-43-4-2.5(c).**

The crime of receiving stolen auto parts is defined by law as follows:

A person who [knowingly] [intentionally] [receives] [retains] [disposes of] a motor vehicle or any part of a motor vehicle of another person that has been the subject of theft commits receiving stolen auto parts, a Class D felony.

Before you may convict the Defendant the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [received] [retained] [disposed of]
4. [a motor vehicle] [any part of a motor vehicle] of (*name*)
5. when [the motor vehicle] [the part of the motor vehicle] had been the subject of theft
6. and when Defendant knew [the motor vehicle] [the part of the motor vehicle] had been the subject of a theft
7. and when the Defendant's (receiving) (retaining) (disposing of) [the motor vehicle] [the part of the motor vehicle] was not with the purpose of restoring it to the owner].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of receiving stolen auto parts, a Class D felony, as charged in Count \_\_\_\_\_.

**Comments**

Receiving stolen auto parts is a Class C felony where the Defendant has a prior conviction for this offense. The trial of the C felony must be bifurcated. *See* the instructions in Chapter 15.

The term "motor vehicle" is defined by law. *See* I.C. 35-41-1-18.5; Instruction No. 14.137.

The addition of the last element — disproving a defense — should only be given as a final instruction and after evidence has been introduced to put the defense in issue.

**[Next Page is 4-75]**



**Instruction No. 4.41. Receiving Stolen Property — Defense.**

**I.C. 35-43-4-5(d).**

Deleted. See now the defense as an element for the State to disprove under Instructions 4.37 and 4.39.

**Instruction No. 4.42. Conversion or Misappropriation of Title Insurance Escrow Funds.**

**I.C. 35-43-9-7.**

The crime of conversion or misappropriation of title insurance escrow is defined by law as follows:

[An (officer) (director) (employee) of a title insurer] [An individual associated with the title insurer as (an independent contractor) (a title insurance agent)] who [knowingly] [intentionally] [(converts) (misappropriates) money (received) (held) in a title insurance escrow account] [(receives) (conspires to receive) money (converted) (misappropriated) from a title insurance escrow account] commits a Class D felony. [The offense is a Class C felony if the amount of money converted, misappropriated or received or for which there is a conspiracy is more than ten thousand dollars (\$10,000) but less than one hundred thousand dollars (\$100,000).] [The offense is a Class B felony if the amount of money converted, misappropriated or received or for which there is a conspiracy is at least one hundred thousand dollars (\$100,000)].

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. [knowingly] [intentionally]
3. [while an (officer) (director) (employee) of [name insurer], a title insurer] [or]  
[while associated with [name insurer], a title insurer, as an [independent contractor] [title insurance agent]
4. [(converted) (misappropriated) money received or held in a title insurance escrow account]  
[(received) (conspired to receive) money which was (converted) (misappropriated) from a title insurance escrow account]  
[or]
5. (for Class C felony) and the amount of money (converted) (misappropriated) (received) (for which there was a conspiracy to receive) was more than \$10,000, but less than \$100,000]
6. (for Class B felony) and the amount of money (converted) (misappropriated) (received) (for which there was a conspiracy to receive) was at least \$100,000].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of conversion or misappropriation of title insurance escrow funds, a Class D/C/B felony, as charged in Count \_\_\_\_\_.



**Comments**

The terms "title insurance agent," "title insurance escrow account" and "title insurer" are defined by law. See I.C. 35-43-9-4, 35-43-9-5, and 35-43-9-6; Instruction Nos. 14.204a, 14.204b, and 14.204c.

**Instruction No. 4.42.5(a). Vending Machine Vandalism (Damaging)****I.C. 35-43-4-7(b)(1).**

The crime of vending machine vandalism is defined by law as follows:

A person who [knowingly] [intentionally] damages a vending machine, commits vending machine vandalism, a class B misdemeanor. [The offense is a class A misdemeanor if the amount of damage is at least \$250.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. damaged a vending machine
4. *(for Class A misdemeanor)* and the amount of damage was at least \$250].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of vending machine vandalism, a Class A/B misdemeanor, as charged in Count \_\_\_\_\_.



**Comments**

The term "vending machine" is defined by law. See I.C. 35-43-4-7; Instruction No. 14.215a.

**Instruction No. 4.42.5(b). Vending Machine Vandalism (Removing Contents).****I.C. 35-43-4-7(b)(2).**

The crime of vending machine vandalism is defined by law as follows:

A person who [knowingly] [intentionally] removes [goods] [wares] [merchandise] [other property] from a vending machine without [inserting a coin, bill, or token made for that purpose] [the consent of the owner or operator of the vending machine], commits vending machine vandalism, a class B misdemeanor. [The offense is a class A misdemeanor if the amount of the (goods) (wares) (merchandise) (other property) removed from the vending machine is at least \$250.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. removed [goods] [wares] [merchandise] [other property]
4. without  
[inserting a coin, bill, or token made for that purpose]  
[or]  
[the consent of the owner or operator of the vending machine]
- [5. (for Class A misdemeanor) and the amount of the (goods) (wares) (merchandise) (other property) removed from the vending machine was at least \$250].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of vending machine vandalism, a Class B/A misdemeanor, as charged in Count \_\_\_\_\_.



**Instruction No. 4.43.1 Forgery.**

I.C. 35-43-5-2.

The crime of forgery is defined by law as follows:

A person who, with intent to defraud, [makes] [utters] [possesses] a written instrument in such a manner that it purports to have been made [by another person] [at another time] [with different provisions] [by authority of one who did not give authority], commits forgery, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with intent to defraud
3. [made] [uttered] [possessed] a written instrument
4. purporting to have been made

[by (*name*), another person]

[or]

[on (*give purported date*), when the written instrument was actually made on (*give alleged actual date*)]

[or]

[with different provisions]

[or]

[by authority of (*name*) when (*name*) had not given authority].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of forgery, a Class C felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms "make," "written instrument" and "utter" are defined by law. See I.C. 35-43-5-1 and I.C. 35-41-1-27; Instruction Nos. 14.12, 14.219 and 14.215.

**Instruction No. 4.43.2. Counterfeiting — Making or Uttering.**

I.C. 35-43-5-2.

The crime of counterfeiting is defined by law as follows:

A person who [knowingly] [intentionally] [makes] [utters] a written instrument in such a manner that it purports to have been made [by another person] [at another time] [with different provisions] [by authority of one who did not give authority], commits counterfeiting, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [made] [uttered] a written instrument
4. in such a manner that it purported to have been made  
[by (*name*), another person]  
[or]  
[on (*give purported date*), when the written instrument was actually made  
on (*give alleged actual date*)]  
[or]  
[with different provisions]  
[or]  
[by authority of (*name*) when (*name*) had not given authority].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of counterfeiting, a Class D felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms “make,” “written instrument” and “utter” are defined by law. See I.C. 35-43-5-1 and I.C. 35-41-1-27; Instruction Nos. 14.12, 14.219 and 14.215.



**Instruction No. 4.43.3. Counterfeiting — Possessing.**

I.C. 35-43-5-2.

The crime of counterfeiting is defined by law as follows:

A person who [knowingly] [intentionally] possessed more than one (1) written instrument knowing that the written instruments were made in a manner that they purport to have been made [by another person] [at another time] [with different provisions] [by authority of one who did not give authority], commits counterfeiting, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. possessed more than one (1) written instrument
4. knowing that the written instruments had been made in a such a manner that they purported to have been made  
[by (*name*), another person]  
[or]  
[on (*give purported date*), when the written instrument was actually made on (*give alleged actual date*)]  
[or]  
[with different provisions]  
[or]  
[by authority of (*name*) when (*name*) had not given authority].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of counterfeiting, a Class D felony, as charged in Count \_\_\_\_\_.

**Comments**

The term "written instrument" is defined by law. See I.C. 35-43-5-1;

## Instruction No. 14.219.

(Text continued on page 4-83)



**Instruction No. 4.45(a). Fraud (Use of Credit Card).****I.C. 35-43-5-4(1).**

The crime of fraud is defined by law as follows:

A person who, with intent to defraud, obtains property by [using a credit card, knowing that the credit card was unlawfully (obtained) (retained)] [using a credit card, knowing that the credit card is (forged) (revoked) (expired)] [using, without consent, a credit card that was issued to another person] [representing, without the consent of the credit card holder, that he is the authorized holder of the credit card] [representing that he is the authorized holder of a credit card when the card has not in fact been issued] commits fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with intent to defraud
3. obtained (*describe property*)
4. [by using a credit card when Defendant knew that the credit card was unlawfully (obtained) (retained)]

[or]

[by using a credit card when Defendant knew that the credit card was (forged) (revoked) (expired)]

[or]

[by using a credit card issued to (*name cardholder*), the cardholder, without (*name cardholder*)'s consent]

[or]

[while representing, without the consent of (*name cardholder*), the cardholder, that Defendant was the authorized holder of the credit card]

[or]

[by representing that Defendant was the authorized holder of a credit card when the card in fact had not been issued].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of fraud, a Class D felony, as charged in Count \_\_\_\_\_.

*Instruction 4.45(a)* **Comments** *(Added, with amendments)*

The terms "property," "credit card" and "credit card holder" are defined by law. See I.C. 35-41-1-23 and I.C. 35-43-5-1; Instruction Nos. 14.165, 15.35 and 14.37.



**Instruction No. 4.45(b). Fraud (Failing to Furnish Property on Credit Card).****I.C. 35-43-5-4(2).**

The crime of fraud is defined by law as follows:

A person who, being authorized by an issuer to furnish property upon presentation of a credit card, fails to furnish the property and, with intent to defraud the issuer or the credit card holder, represents in writing to the issuer that he has furnished the property commits fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was authorized by (name issuer of card), the issuer of a credit card, to furnish property upon the presentation of that card
3. and Defendant
4. acting with intent to defraud [(name issuer of card, the issuer of the card] [(name the credit card holder), the credit card holder]
5. represented to (name issuer of card), the issuer of the card, that he had furnished (name property alleged)
6. when in fact Defendant had failed to furnish (name property) property.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of fraud, a Class D felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms "property," "credit card" and "credit card holder" are defined by law. See I.C. 35-41-1-23 and I.C. 35-43-5-1; Instruction Nos. 14.165, 14.35 and 14.37.



**Instruction No. 4.45(c). Fraud (Furnish Property with Intent to Defraud — Credit Card).****I.C. 35-43-5-4(3).**

The crime of Fraud is defined by law as follows:

A person who, being authorized by an issuer to furnish property upon presentation of a credit card, furnishes, with intent to defraud [the issuer] [the credit card holder], property upon presentation of a credit card, knowing that [the credit card was unlawfully (obtained) (retained)] [the credit card is (forged) (revoked) (expired)], commits fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was authorized by (*name issuer of card*), the issuer of a credit card, to furnish property upon the presentation of the card
3. and Defendant
4. acting with the intent to defraud  
[(*name issuer of card*, the issuer of the card)  
[or]  
[(*name the credit card holder*), the credit card holder]
5. furnished (*describe property alleged*) upon presentation of the credit card
6. when Defendant knew that the card had  
[been unlawfully (obtained) (retained)]  
[or]  
[(been forged) (been revoked) (expired)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of fraud, a Class D felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms "property," "credit card" and "credit card holder" are defined by law. See I.C. 35-41-1-23 and I.C. 35-43-5-1; Instruction Nos. 14.165, 14.35 and 14.37.



**Instruction No. 4.45(d). Fraud (Selling or Receiving Credit Card).****I.C. 35-43-5-4(4), (5).**

The crime of fraud is defined by law as follows:

A person who, not being the issuer, [knowingly] [intentionally] [sells a credit card] [receives a credit card] knowing that the credit card was [unlawfully (obtained) (retained)] [(forged) (revoked) (expired)] commits fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [sold a credit card]  
[or]  
[received a credit card]
4. when the Defendant was not the issuer of the credit card
5. and when Defendant knew that the credit card had  
[been unlawfully (obtained) (retained)]  
[or]  
[(been forged) (been revoked) (expired)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of fraud, a Class D felony, as charged in Count \_\_\_\_\_.

**Comments**

The term "credit card" is defined by law. See I.C. 35-43-5-1; Instruction No. 14.35.



**Instruction No. 4.45(e). Fraud (Unlawful Security for Debt —  
Credit Card).**

**I.C. 35-43-5-4(6).**

The crime of fraud is defined by law as follows:

A person who, with intent to defraud, receives a credit card as security for debt, commits fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. received a credit card as security for a debt
3. with intent to defraud (*name*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of fraud, a Class D felony, as charged in Count \_\_\_\_\_.

**Comments**

The term "credit card" is defined by law. See I.C. 35-43-5-1; Instruction No. 14.35.



**Instruction No. 4.55(g). Fraud (Property).**

**I.C. 35-43-5-4(8) & (9).**

The crime of fraud is defined by law as follows:

A person who, [with intent to defraud (his creditor) (his purchaser), (conceals) (encumbers) (transfers) property] [with intent to defraud, damages property], commits fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
- [2. with the intent to defraud (*name*), who was his [creditor] [purchaser]
3. (concealed) (encumbered) (transferred) (*describe property*)]
- [or]
- [2. with the intent to defraud
3. damaged (*describe property*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of fraud, a Class D felony as charged in Count \_\_\_\_\_.

**Comments**

The term "property" is defined by law. See I.C. 35-41-1-23; Instruction No. 14.165.



**Instruction No. 4.53(f). Fraud (Receiving Unlawfully Obtained Property — I.C. 35-43-5-4(7). Credit Card).**

The crime of fraud is defined by law as follows:

A person who receives property, knowing that the property was obtained by a person who, with intent to defraud, obtained the property by [using a credit card, knowing that the credit card was unlawfully (obtained) (retained)] [using a credit card, knowing that the credit card is (forged) (revoked) (expired)] [using, without consent, a credit card that was issued to another person] [representing, without the consent of the credit card holder, that he is the authorized holder of the credit card] [representing that he is the authorized holder of a credit card when the card has not in fact been issued] commits fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. received (*describe property*)
3. when Defendant knew that the property was obtained by a person, (*name*), who, with intent to defraud, had obtained the property
4. [by using a credit card when (*name*) knew that the credit card was unlawfully (obtained) (retained)]

[or]

[by using a credit card when (*name*) knew that the credit card was (forged) (revoked) (expired)]

[or]

[by using a credit card issued to (*name cardholder*), the cardholder, without (*name cardholder*)'s consent]

[or]

[while representing, without the consent of (*name cardholder*), the cardholder, that (*name*) was the authorized holder of the credit card]

[or]

[by representing that (*name*) was the authorized holder of a credit card when the card in fact had not been issued].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of fraud, a Class D felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms "property," "credit card" and "credit card holder" are defined by law. See I.C. 35-41-1-23 and I.C. 35-43-5-1; Instruction Nos. 14.165, 14.35 and 14.37.



**Instruction No. 4.55(h). Fraud (On Insurer).**

I.C. 35-43-5-4(10).

This instruction has been withdrawn. For current insurance fraud instructions see Instruction Nos. 4.56.1 through 4.56.6.

**Instruction No. 4.55(i). Fraud (Recordings).**

I.C. 35-43-5-4(11).

The crime of fraud is defined by law as follows:

A person who, [knowingly] [intentionally] [sells] [rents] [transports] [possesses] a recording [for commercial gain] [for personal gain] that does not conspicuously display the true name and address of the manufacturer of the recording commits fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. for [commercial gain] [personal gain]
3. [knowingly] [intentionally]
4. [sold] [rented] [transported] [possessed] a recording
5. on which was not conspicuously displayed the true name and address of (*name of manufacturer*), the manufacturer of the recording.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of fraud, a Class D felony, as charged in Count \_\_\_\_\_.



**Instruction No. 4.56.1. Insurance Fraud — False Claim Statement.**

I.C. 35-43-5-4.5.

The crime of insurance fraud is defined by statute as follows:

A person who knowingly and with intent to defraud makes, utters, presents, or causes to be presented to an insurer or an insurance claimant, a claim statement that contains false, incomplete, or misleading information concerning the claim, commits insurance fraud, a Class D felony. [The offense is a Class C felony if the (value of property, services, or other benefits obtained or attempted to be obtained by the person as a result of the offense) (economic loss suffered by another person as a result of the offense) is at least two thousand five hundred dollars (\$2,500).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly
3. and with intent to defraud
4. [made]  
[or]  
[uttered]  
[or]  
[presented]  
[or]  
[caused to be presented]
5. to [*name entity or individual*], who was at the time [an insurer] [an insurance claimant],
6. a claim statement that contained [false] [incomplete] [misleading] information concerning the claim
- [7. and  
(the value of property, services, or other benefits obtained or sought to be obtained)  
(or)  
(the economic loss suffered by [*name other person*], another person)

was at least two thousand five hundred dollars (\$2,500).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of insurance fraud, a Class D/C felony, charged in Count \_\_\_\_\_.

**Comments**

Trial of C felony insurance fraud based on a prior conviction must be bifurcated. See Instruction No. 15.82.

The terms "claim statement," "insurer," and "property" are defined by law. See IC 35-43-5-1, IC 35-41-1-23; Instruction Nos. 14.16c, 14.117.4, and 14.165.



**Instruction No. 4.56.2. Insurance Fraud — False Statement.**

I.C. 35-43-5-4.5.

The crime of insurance fraud is defined by statute as follows:

A person who knowingly and with intent to defraud [presents] [causes to be presented] [prepares with knowledge or belief that it will be presented to or by an insurer] an [oral] [a written] [an electronic] statement that the person knows

to contain materially false information [as part of] [in support of] [concerning a fact that is material to]

[the rating of an insurance policy]

[a claim for payment or benefit under an insurance policy]

[premiums paid on an insurance policy]

[payments made in accordance with the terms of an insurance policy]

[an application for a certificate of authority]

[the financial condition of an insurer]

[the acquisition of an insurer]

or

conceals any information concerning

[the rating of an insurance policy]

[a claim for payment or benefit under an insurance policy]

[premiums paid on an insurance policy]

[payments made in accordance with the terms of an insurance policy]

[an application for a certificate of authority]

[the financial condition of an insurer]

[the acquisition of an insurer]

commits insurance fraud, a Class D felony. [The offense is a Class C felony if the (value of property, services, or other benefits obtained or attempted to be obtained by the person as a result of the offense) (economic loss suffered by another person as a result of the offense) is at least two thousand five hundred dollars (\$2,500).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly
3. and with intent to defraud
4. [presented]  
[or]  
[caused to be presented]  
[or]  
[prepared with knowledge or belief that it would be presented]
5. [to] [by] (*name individual or entity*, who was at the time an insurer)
6. [an oral] [a written] [an electronic] statement
7. [that contained (*specify information*) which the Defendant knew was materially false information (as part of) (in support of) (concerning)]  
[or]  
[that concealed (*specify what was concealed*), which was information concerning]
8. [the rating of an insurance policy]  
[or]  
[a claim for payment or benefit under an insurance policy]  
[or]  
[premiums paid on an insurance policy]  
[or]  
[payments made in accordance with the terms of an insurance policy]  
[or]  
[an application for a certificate of authority]  
[or]  
[the financial condition of an insurer]  
[or]  
[the acquisition of an insurer]



9. [and (the value of property, services, or other benefits obtained or sought to be obtained)  
(or)  
(the economic loss suffered by [name other person], another person)  
was at least two thousand five hundred dollars (\$2,500).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of insurance fraud, a Class D/C felony, charged in Count \_\_\_\_\_.

### Comments

Trial of C felony insurance fraud based on a prior conviction must be bifurcated. See Instruction No. 15.82.

The terms "insurer" and "property" are defined by law. See IC 35-43-5-1, IC 35-41-1-23; Instruction Nos. 14.117.4 and 14.165.

**Instruction No. 4.56.3. Insurance Fraud — Risks for Insolvent Insurer.**

I.C. 35-43-5-4.5.

The crime of insurance fraud is defined by statute as follows:

A person who knowingly and with intent to defraud solicits or accepts new or renewal insurance risks by or for an insolvent insurer or other entity regulated under IC 27 commits insurance fraud, a Class D felony. [The offense is a Class C felony if the (value of property, services, or other benefits obtained or attempted to be obtained by the person as a result of the offense) (economic loss suffered by another person as a result of the offense) is at least two thousand five hundred dollars (\$2,500).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly
3. and with intent to defraud
4. [solicited] [accepted]
5. [*describe alleged risks*], which were [new] [renewal] insurance risks
6. [by] [for] (*name entity or individual*), [which] [who] was at the time [an insolvent insurer] [an insolvent entity regulated under Title 27 of the Indiana Code]
7. [and  
(the value of property, services, or other benefits obtained or sought to be obtained)  
(or)  
(the economic loss suffered by [*name other person*], another person)  
was at least two thousand five hundred dollars (\$2,500).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of insurance fraud, a Class D/C felony, charged in Count \_\_\_\_\_.

**Comments**

Trial of C felony insurance fraud based on a prior conviction must be bifurcated. See Instruction No. 15.82.



#### 4-104.1

#### OFFENSES AGAINST PROPERTY

The term "insurer" is defined by law. See IC 35-43-5-1; Instruction No. 14.117.4.

**Instruction No. 4.56.4. Insurance Fraud — Removal of Insurer's Assets.**

I.C. 35-43-5-4.5.

The crime of insurance fraud is defined by statute as follows:

A person who knowingly and with intent to defraud removes [the assets] [the record of assets, transactions, and affairs] [a material part of the (assets) (the record of assets, transactions, and affairs)] of [an insurer] [another entity regulated under IC 27] from [the home office] [other place of business] [place of safekeeping] of the [insurer] [other regulated entity], commits insurance fraud, a Class D felony. . [The offense is a Class C felony if the (value of property, services, or other benefits obtained or attempted to be obtained by the person as a result of the offense) (economic loss suffered by another person as a result of the offense) is at least two thousand five hundred dollars (\$2,500).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly
3. and with intent to defraud
4. removed
  - [the assets]
  - [or]
  - [the record of assets, transactions, and affairs]
  - [or]
  - [a material part of the (assets) (the record of assets, transactions, and affairs)]
5. of (*name entity*), which was at the time [an insurer] [an entity regulated under Title 27 of the Indiana Code]
6. from
  - [the home office]
  - [or]
  - [other place of business]
  - [or]



[(*name*), a place of safekeeping]

of (*name individual or entity*),

7. [and

(the value of property, services, or other benefits obtained or sought to be obtained).

(or)

(the economic loss suffered by [*name other person*], another person)

was at least two thousand five hundred dollars (\$2,500).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of insurance fraud, a Class D/C felony, charged in Count \_\_\_\_\_.

### Comments

Trial of C felony insurance fraud based on a prior conviction must be bifurcated. See Instruction No. 15.82.

The term "insurer" is defined by law. See IC 35-43-5-1; Instruction No. 14.117.4.

**Instruction No. 4.56.5. Insurance Fraud — Concealment of Insurer's Assets.**

I.C. 35-43-5-4.5.

The crime of insurance fraud is defined by statute as follows:

A person who knowingly and with intent to defraud [conceals] [attempts to conceal] from the department of insurance [the assets] [the record of assets, transactions, and affairs] of [an insurer] [another entity regulated under IC 27] commits insurance fraud, a Class D felony. [The offense is a Class C felony if the (value of property, services, or other benefits obtained or attempted to be obtained by the person as a result of the offense) (economic loss suffered by another person as a result of the offense) is at least two thousand five hundred dollars (\$2,500).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly
3. and with intent to defraud
4. [concealed]  
[or]  
[attempted to conceal]
5. from the Indiana Department of Insurance
6. [the assets]  
[or]  
[the record of assets, transactions, and affairs]
7. of (*name entity*), which was at the time [an insurer] [an entity regulated under Title 27 of the Indiana Code]
8. [and  
(the value of property, services, or other benefits obtained or sought to be obtained)  
(or)  
(the economic loss suffered by [*name other person*], another person)  
was at least two thousand five hundred dollars (\$2,500).]



If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of insurance fraud, a Class D/C felony, charged in Count \_\_\_\_\_.

**Comments**

Trial of C felony insurance fraud based on a prior conviction must be bifurcated. See Instruction No. 15.82.

The term "insurer" is defined by law. See IC 35-43-5-1; Instruction No. 14.117.4.

**Instruction No. 4.56.6. Insurance Fraud — Diversion of Funds.**

I.C. 35-43-5-4.5.

The crime of insurance fraud is defined by statute as follows:

A person who knowingly and with intent to defraud diverts funds of [an insurer] [another person] in connection with [the transaction of insurance or reinsurance] [the conduct of business activities by (an insurer) (another entity regulated under IC 27)] [the (formation) (acquisition) (dissolution) of (an insurer) (another entity regulated under IC 27)] commits insurance fraud, a Class D felony. [The offense is a Class C felony if the (value of property, services, or other benefits obtained or attempted to be obtained by the person as a result of the offense) (economic loss suffered by another person as a result of the offense) is at least two thousand five hundred dollars (\$2,500).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly
3. and with intent to defraud
4. diverted funds of (*name entity*), [an insurer] [another person]
5. and the diversion of funds was in connection with  
[the transaction of insurance or reinsurance]  
[or]  
[the conduct of business activities by (*name entity*), (an insurer) (an entity regulated under Title 27 of the Indiana Code)]  
[or]  
[the (formation) (acquisition) (dissolution) of (*name entity*), (an insurer) (an entity regulated under Title 27 of the Indiana Code)]
6. [and  
(the value of property, services, or other benefits obtained or sought to be obtained)  
(or)  
(the economic loss suffered by [*name other person*], another person)



was at least two thousand five hundred dollars (\$2,500).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of insurance fraud, a Class D/C felony, charged in Count \_\_\_\_\_.

### Comments

Trial of C felony insurance fraud based on a prior conviction must be bifurcated. See Instruction No. 15.82.

The term "insurer" is defined by law. See IC 35-43-5-1; Instruction No. 14.117.4.

**Instruction No. 4.57(a). Welfare Fraud (Unlawfully Obtaining).**

I.C. 35-43-5-7(a)(1).

The crime of welfare fraud is defined by law as follows:

A person who [knowingly] [intentionally] obtains public [relief] [assistance] by means of [impersonation] [fictitious transfer] [(false) (misleading) (oral) (written) statement] [fraudulent conveyance] [other fraudulent means] commits welfare fraud, a Class A misdemeanor. [The offense is a Class D felony if the amount of public (relief) (assistance) involved is more than two hundred fifty dollars (\$250) but less than two thousand five hundred dollars (\$2,500).] [The offense is a Class C felony if the amount of public relief or assistance involved is two thousand five hundred dollars (\$2,500) or more.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. obtained public [relief] [assistance]
4. by means of
  - [impersonation]
  - [or]
  - [fictitious transfer]
  - [or]
  - [(false) (misleading) oral statement]
  - [or]
  - [(false) (misleading) written statement]
  - [or]
  - [fraudulent conveyance]
  - [or]
  - [the fraudulent means of (*here specify means alleged*)]
5. (*for Class D felony*) and the amount of public (relief) (assistance) was more than two hundred and fifty dollars (\$250) but less than two thousand five hundred dollars (2,500)]



- [6. (for Class C felony) and the amount of public (relief) (assistance) was two thousand five hundred dollars (\$2,500) or more].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Welfare Fraud, a Class A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

### Comments

Trial of this offense as a Class D felony for a prior conviction must be bifurcated. See Chapter 15.

**Instruction No. 4.57(b). Welfare Fraud (Unlawful Use).**

I.C. 35-43-5-7(a)(2).

The crime of welfare fraud is defined by law as follows:

A person who [knowingly] [intentionally] [acquires] [possesses] [uses] [transfers] No Textpos Rule Present [trades] [issues] [disposes of] [an authorization document to obtain public (relief) (assistance)] [(public (relief) (assistance))], except as authorized by law, commits welfare fraud, a Class A misdemeanor. [The offense is a Class D felony if the amount of public relief or assistance involved is more than two hundred fifty dollars (\$250) but less than two thousand five hundred dollars (\$2,500).] [The offense is a Class C felony if the amount of public relief or assistance involved is two thousand five hundred dollars (\$2,500) or more.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. not being authorized by law
3. [knowingly] [intentionally]
4. [acquired]

[or]

[possessed]

[or]

[used]

[or]

[transferred]

[or]

[sold]

[or]

[traded]

[or]

[issued]



[or]

[disposed of]

5. [an authorization document to obtain public (relief) (assistance)]

[or]

[public (relief) (assistance)]

- [6. (*for Class D felony*) and the amount of public [relief] [assistance] was more than two hundred and fifty dollars (\$250) but less than two thousand five hundred dollars (\$2,500)]
- [7. (*for Class C felony*) the amount of public [relief] [assistance] was two thousand five hundred dollars (\$2,500) or more].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of welfare fraud, a Class A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

### Comments

A trial of welfare fraud as a Class D felony based on a prior conviction must be bifurcated. See Chapter 15.

The term "public relief or assistance" is defined by law. See I.C. 35-43-5-1; Instruction No. 14.167.

(Text continued on page 4-105)





**Instruction No. 4.57(c). Welfare Fraud (Unlawful Use of Incomplete I.C. 35-43-5-7(a)(3). Documents).**

The crime of welfare fraud is defined by law as follows:

A person who [knowingly] [intentionally] [uses] [transfers] [acquires] [issues] [possesses] a [blank] [incomplete] authorization document to participate in public [relief] [assistance] programs in a manner not authorized by law, commits welfare fraud, a Class A misdemeanor. [The offense is a Class D felony if the amount of public relief or assistance involved is more than two hundred fifty dollars (\$250) but less than two thousand five hundred dollars (\$2,500).] [The offense is a Class C felony if the amount of public relief or assistance involved is two thousand five hundred dollars (\$2,500) or more.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. in a manner not authorized by law
3. [knowingly] [intentionally]
4. [used]  
[transferred]  
[or]  
[acquired]  
[or]  
[issued]  
[or]  
[possessed]
5. a [blank] [incomplete] authorization document to participate in a public [relief] [assistance] program
- [6. (for Class D felony) and the amount of public (relief) (assistance) involved was more than two hundred and fifty dollars (\$250) but less than two thousand five hundred dollars (\$2,500)]
- [7. (for Class C felony) and the amount of public (relief) (assistance) involved was two thousand five hundred dollars (\$2,500) or more].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of welfare fraud, a Class A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

**Comments**

A trial of welfare fraud as a Class D felony based on a prior conviction must be bifurcated. See Chapter 15.

The term "public relief or assistance" is defined by law. See I.C. 35-43-5-1; Instruction No. 14.167.



**Instruction No. 4.57(d). Welfare Fraud (Counterfeit Documents).****I.C. 35-43-5-7(a)(4).**

The crime of welfare fraud is defined by law as follows:

A person who [knowingly] [intentionally] [(counterfeits) (alters) an authorization document to receive public (relief) (assistance)] [knowingly (uses) (transfers) (acquires) (possesses) a (counterfeit) (altered) authorization document to receive public (relief) (assistance)], commits welfare fraud, a Class A misdemeanor. [The offense is a Class D felony if the amount of public relief or assistance involved is more than two hundred fifty dollars (\$250) but less than two thousand five hundred dollars (\$2,500).] [The offense is a Class C felony if the amount of public relief or assistance involved is two thousand five hundred dollars (\$2,500) or more.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [(counterfeited) (altered) an authorization document]  
[or]  
[knowingly (used)]  
[or]  
(transferred)  
[or]  
(acquired)  
[or]  
(possessed)  
a (counterfeit) (altered) authorization document]
4. to receive public (relief) (assistance)
5. (for Class D felony) and the amount of public [relief] [assistance] involved was more than two hundred and fifty dollars (\$250) but less than two thousand five hundred dollars (\$2,500)
6. (for Class C felony) and the amount of public [relief] [assistance] involved was two thousand five hundred dollars (\$2,500) or more].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of welfare fraud, a Class A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

**Comments**

A trial of welfare fraud as a Class D felony based on a prior conviction must be bifurcated. See Chapter 15.

The term "public relief or assistance" is defined by law. See I.C. 35-43-5-1; Instruction No. 14.167.



**Instruction No. 4.57(e). Welfare Fraud (Concealing Information).****I.C. 35-43-5-7(a)(5).**

The crime of welfare fraud is defined by law as follows:

A person who [knowingly] [intentionally] conceals information for the purpose of receiving public relief or assistance to which he is not entitled, commits welfare fraud, a Class A misdemeanor. [The offense is a Class D felony if the amount of public relief or assistance involved is more than two hundred fifty dollars (\$250) but less than two thousand five hundred dollars (\$2,500).] [The offense is a Class C felony if the amount of public relief or assistance involved is two thousand five hundred dollars (\$2,500) or more.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. concealed information that(*describe information*)
4. for the purpose of obtaining public (relief) (assistance) to which Defendant was not entitled
- [5. (*for Class D felony*) and the amount of public [relief] [assistance] was more than two hundred and fifty dollars (\$250) but less than two thousand five hundred dollars (\$2,500)
- [6. (*for Class C felony*) and the amount of public [relief] [assistance] was two thousand five hundred dollars (\$2,500) or more].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of welfare fraud, a Class A misdemeanor/D/C felony as charged in Count \_\_\_\_\_.

**Comments**

A trial of welfare fraud as a Class D felony based on a prior conviction must be bifurcated. See Chapter 15. The term "public relief or assistance" is defined by law. See I.C. 35-43-5-1; Instruction No. 14.167.



**Instruction No. 4.58(a1). Medicaid Fraud (Claim Violating I.C. 12-15).**

**I.C. 35-43-5-7.1(a)(1).**

This instruction has been removed, due to a holding that the statute is unconstitutionally vague. See Comment following.

**Comments**

The Committee notes that the C felony can be obtained only for these first two formulations of the Medicaid fraud offense, as those are the only ones which contain either a “claim” or “payment” in their elements.

The Indiana Supreme Court in *Healthscript, Inc. v State*, 770 N.E.2d 810 (Ind., 2002) found section (a)(1) of this statute [“files a Medicaid claim, including an electronic claim, in violation of I.C. 12-15”] too vague to give “fair warning” when it encompasses any claim filed “in violation of Indiana Code (section) 12-15” and the regulations that chapter references, and thus violates the requirements of due process. Three justices concurred that a charge might have been upheld for the same act if properly drawn under section (a)(2) (see Instruction 4.58(a2)).



**Instruction No. 4.58(a2). Medicaid Fraud (Payment by False Statement).**

**I.C. 35-43-5-7.1(a)(2).**

The crime of medicaid fraud is defined by law as follows:

A person who [knowingly] [intentionally] obtains payment from the Medicaid program under I.C. 12-15 by means of [a false or misleading (oral) (written) statement] [fraudulent means other than a false or misleading statement], commits Medicaid fraud, a Class D felony. [The offense is a Class C felony if the fair market value of the payment is at least one hundred thousand dollars (\$100,000).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. obtained payment from the Medicaid program under I.C. 12-15  
[by means of a false or misleading (oral) (written) statement]  
[or]  
[by fraudulent means other than a false or misleading statement, by  
(specify the alleged fraudulent means other than a false or misleading statement.)]
- [4. (for Class C felony) and the market value of the [claim] [payment] was at least fifty thousand dollars (\$100,000).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of medicaid fraud, a Class D/C felony, as charged in Count \_\_\_\_\_.

**Comments**

The Committee notes that the C felony can be obtained only for the subsection (a)(1) and (a)(2) of the Medicaid fraud offense, as those are the only ones which contain either a "claim" or "payment" in their elements.

The Supreme Court in *Healthscript, Inc. v State*, 770 N.E.2d 810 (Ind., 2002), found section (a)(1) of this statute ["files a Medicaid claim, including an electronic claim, in violation of I.C. 12-15"] too vague to give "fair warning" when it encompasses any claim filed "in violation of Indiana Code (section) 12-15" and the regulations that chapter references, and thus violates the requirements of due process. Three justices concurred that a charge might have been upheld for the same act if properly drawn under section (a)(2), the section in this instruction.



**Instruction No. 4.58(b). Medicaid Fraud (Provider Number).****I.C. 35-43-5-7.1(a)(3).**

The crime of Medicaid fraud is defined by law as follows:

A person who [knowingly] [intentionally] acquires a provider number under the Medicaid program except as authorized by law commits Medicaid fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. acquired a provider number under the Medicaid program
4. and the acquisition was not authorized by law.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Medicaid fraud, a Class D felony, as charged in Count \_\_\_\_\_.

**Instruction No. 4.58(c). Medicaid Fraud (Provider Documents).****I.C. 35-43-5-7.1(a)(4).**

The crime of Medicaid Fraud is defined by law as follows:

A person who [knowingly] [intentionally] [alters with the intent to defraud] [falsifies] [documents] [records] of a provider (as defined in 42 CFR 1002.301) that are required to be kept under the Medicaid program commits Medicaid fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [alters with intent to defraud]  
[or]  
[falsified]
4. [documents] [records] of (*name provider*), a provider (as defined in 42 CFR 1002.301), that were required to be kept under the Medicaid program.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Medicaid Fraud, a Class D felony, as charged in Count \_\_\_\_\_.



**Comments**

## 42 CFR 400.203

Provider means either of the following:

- (1) For the fee-for-service program, any individual or entity furnishing Medicaid services under an agreement with the Medicaid agency.
- (2) For the managed care program, any individual or entity that is engaged in the delivery of health care services and is legally authorized to do so by the State in which it delivers the services.

**Instruction No. 4.58(d). Medicaid Fraud (Concealing Information)****I.C. 35-43-5-7.1(a)(5).**

The crime of Medicaid fraud is defined by law as follows:

A person who [knowingly] [intentionally] conceals information for the purpose of [applying for] [receiving] unauthorized payments from the Medicaid program commits Medicaid fraud, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. concealed (*specify information allegedly concealed*)
4. for the purpose of [applying for] [receiving] unauthorized payments from the Medicaid program.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Medicaid fraud, a Class D felony, as charged in Count \_\_\_\_\_.



**Instruction No. 4.59(a). Fraud on a Financial Institution (Scheme to Defraud).****I.C. 35-43-5-8(a)(1).**

The crime of fraud on a financial institution is defined by law as follows:

A person who knowingly [executes] [attempts to execute] a [scheme] [artifice] to defraud a [(state) (federally) chartered] [federally insured] financial institution commits a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly [executed] [attempted to execute]
3. a [scheme] [artifice] to defraud (name institution), a [state chartered] [federally chartered] [federally insured] financial institution.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of fraud on a financial institution, a Class C felony, as charged in Count \_\_\_\_\_.

**Comments**

The term "state or federally chartered or federally insured financial institution" is defined by law. See I.C. 35-43-5-8(b); Instruction No. 14.193.



**Instruction No. 4.60(a). Check Fraud (Use of NSF Check, False Information).**

**I.C. 35-43-5-12(b)(1).**

The crime of check fraud is defined by law as follows:

A person who [knowingly] [intentionally] obtains property, through a [scheme] [artifice], with intent to defraud by [issuing] [delivering] a [check] [draft] [an electronic debit] [an order] on a financial institution

(A) knowing that the [check] [draft] [electronic debit] [order] will not be paid or honored by the financial institution upon presentment in the usual course of business

(B) using [false] [altered] evidence of [identity] [residence]

(C) using [a false] [an altered] account number

(D) using [a false] [an altered] [check] [draft] [order] [electronic instrument]

commits Check Fraud, a Class D felony. [The offense is a Class C felony if the person the aggregate amount of property obtained is at least twenty-five thousand dollars (\$25,000)].

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. obtained property [*describe property*] through a [scheme] [artifice]
4. with intent to defraud (*name*)
5. by [issuing] [delivering]
6. [a check]  
[or]  
[a draft]  
[or]  
[an electronic debit]  
[or]  
[an order]
7. on (*name financial institution*), a financial institution
- [8. [knowing that the (check) (draft) (order) (electronic debit) would not be paid or honored by the financial institution upon presentment in the normal course of business]  
[or]  
[using (false) (altered) evidence of (identity) (residence)]  
[or]

[(a false) (an altered) account number]

[(a false) (an altered) (check) (draft) (order) (electronic instrument)]

[8. (for Class C felony) and the aggregate amount of property obtained by the Defendant was at least twenty-five thousand dollars (\$25,000)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of check fraud, a Class D/C felony, as charged in Count \_\_\_\_\_.



**Comments**

The term "financial institution" is defined by law. See I.C. 35-43-5-12; Instruction No. 14.86A.

Trial of check fraud as a Class C felony due to a prior unrelated conviction for the same offense must be bifurcated. See Chapter 15.

**Instruction No. 4.60(b). Check Fraud (Insufficient Deposits).****I.C. 35-43-5-12(b)(2).**

The crime of check fraud is defined by law as follows:

A person who [knowingly] [intentionally] obtains property, through a [scheme] [artifice], with intent to defraud, by depositing the minimum initial deposit required to open an account and [making no additional deposits] [making insufficient additional deposits] to insure debits to the account commits check fraud, a Class D felony. [The offense is a Class C felony if the person the aggregate amount of property obtained is at least twenty-five thousand dollars (\$25,000).

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. obtained (*describe property*) through a [scheme] [artifice]
4. with intent to defraud (*name*)
5. by depositing with (*name financial institution*) the minimum initial deposit required to open an account
6. and making [no] [insufficient] additional deposits to insure debits to the account
7. (*for Class C felony*) and the aggregate amount of property obtained was at least twenty-five thousand dollars (\$25,000).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Check Fraud, a Class D/C felony, as charged in Count \_\_\_\_\_.



**Comments**

The term "financial institution" is defined by law. See I.C. 35-43-5-12; Instruction No. 14.86A.

Trial of check fraud as a Class C felony due to a prior unrelated conviction for the same offense must be bifurcated. See Chapter 15.

**Instruction No. 4.60(c). Check Fraud (Multiple Accounts).****I.C. 35-43-5-12(b)(3).**

The crime of check fraud is defined by law as follows:

A person who [knowingly] [intentionally] obtains property, through a [scheme] [artifice], with intent to defraud by opening accounts with more than one financial institution in either a consecutive or concurrent time period commits check fraud, a Class D felony. [The offense is a Class C felony if the person the aggregate amount of property obtained is at least twenty-five thousand dollars (\$25,000)].

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. obtained (*describe property*) through a [scheme] [artifice]
4. with intent to defraud (*name*)
5. by opening an account with (*name of financial institution*) and with (*name second financial institution*) during the period of (*state time frame*)
- [6. (*for Class C felony*) and the aggregate amount of property obtained was at least twenty-five thousand dollars (\$25,000)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of check fraud, a Class D/C felony, as charged in Count \_\_\_\_\_.



**Comments**

The term "financial institution" is defined by law. See I.C. 35-43-5-12; Instruction No. 14.86A.

Trial of check fraud as a Class C felony due to a prior unrelated conviction for the same offense must be bifurcated. See Chapter 15.

**Instruction No. 4.61. Check Deception.****I.C. 35-43-5-5.**

The crime of check deception is defined by statute as follows:

A person who [knowingly] [intentionally] [issues] [delivers] [a check] [a draft] [an order on a credit institution] [for the payment of] [to acquire] [money] [other property], knowing that it will not be [paid] [honored] by the credit institution upon presentment in the usual course of business, commits check deception, a Class A misdemeanor. [The offense is a Class D felony if (the amount of the [check] [draft] [order] is at least two thousand five hundred dollars [\$2,500]) (the property acquired by the person was a motor vehicle).]

[It is a defense:

- that the Defendant had an account with the credit institution which had sufficient funds in that account when he (issued) (delivered) the (check) (draft) (order for payment) on the credit institution, and that the Defendant paid the payee or holder the amount due, together with protest fees and any lawful service fee or charge within ten (10) days after the payee or holder had mailed notice to the Defendant by regular U.S. mail addressed to (the address printed on the check) (the address given by the Defendant in writing to the payee or holder at the time the check was (issued) (delivered)) that the (check) (draft) (order) had not been paid by the credit institution

or

- that the (payee) (holder) knew that the Defendant had insufficient funds to ensure payment of the (check) (draft) (order)

or

- that the (check) (draft) (order) was postdated

or

- that the (insufficient funds) (credit) resulted from an adjustment to the Defendant's account by the credit institution without notice to the Defendant.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [issued] [delivered]
4. [a check]  
[or]  
[a draft]  
[or]  
[an order on (name), a credit institution]



4. [for the payment of money]  
[or]  
[to acquire (money) (or) (*describe property*)]
5. knowing that the [check] [draft] [order] would not be [paid] [honored] by [name credit institution] upon presentment in the usual course of business
6. and the Defendant had an account with the credit institution that did not have sufficient funds in that account when he (issued) (delivered) the (check) (draft) (order for payment) on the credit institution, and the Defendant did not pay (name), the (payee) (holder), the amount due, together with protest fees and any lawful service fee or charge within ten (10) days after (name payee or holder) had mailed notice to the Defendant by regular U.S. mail addressed to (the address printed on the check) (the address given by the Defendant in writing to (name payee or holder) at the time the check was [issued] [delivered]) that the (check) (draft) (order) had not been paid by the credit institution]
7. and (name payee or holder), the (payee) (holder), did not know that the Defendant had insufficient funds to ensure payment of the (check) (draft) (order)]
8. the (check) (draft) (order) was not postdated]
9. the (insufficient funds) (credit) did not result from an adjustment to the Defendant's account by the credit institution without notice to the Defendant]
10. (*for Class D felony*) and the (check) (draft) (order) was at least two thousand five hundred dollars (\$2,500)]
11. (*for Class D felony*) and the property acquired by the Defendant was a motor vehicle].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Check Deception, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

### Comments

The addition of the elements set out in the alternative paragraphs 6-9, for the State's disproving the statutory defenses specific to the offense of check deception, should only be given after evidence has been introduced to put the specific defenses in issue. These defenses are found in I.C. 35-43-5-5(e) and 35-43-5-5(f). See section (e) to define the amount of service fee or charge that can lawfully be assessed.

The terms "property," "motor vehicle," and "credit institution" are defined by law. See I.C. 35-41-1-23, I.C. 35-41-1-18.5, and I.C. 35-41-1-5; Instruction Nos. 14.165, 14.137 and 14.39.



**Instruction No. 4.63. Check Deception — Defense.**

**I.C. 35-43-5-5(e).**

Deleted.

The defense has been incorporated in Instruction No. 4.61 as an element which the State must disprove.

**Instruction No. 4.65. Check Deception — Defense.****I.C. 35-43-5-5(f).**

Deleted.

The defense has been incorporated in Instruction No. 4.61 as an element which the State must disprove.



**Instruction No. 4.67. False Representation — Disadvantaged or Women-Owned Business.****I.C. 35-43-5-9.**

The crime of false representation as a disadvantaged or women-owned business is defined by law as follows:

A person who [knowingly] [intentionally] falsely represents any entity as a [disadvantaged business enterprise] [a women-owned business enterprise] in order to qualify for certification as such an enterprise under a program conducted by a public agency designed to assist [disadvantaged business enterprises] [women-owned business enterprises] in obtaining contracts with public agencies for the provision of goods and services commits a Class D felony.

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. falsely represented (*name entity*) as  
[a disadvantaged business enterprise]  
[or]  
[a women-owned business enterprise]
3. in order to qualify for certification as such an enterprise under a program conducted by [*name*], a public agency, designed to assist [disadvantaged business enterprises] [women-owned business enterprises] in obtaining contracts with public agencies for the provision of goods and services.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of false representation, a Class D felony as charged in Count \_\_\_\_\_.

**Comments**

The terms "disadvantaged business enterprise" and "women-owned business enterprise" are defined by law. See I.C. 5-16-6.5-1; Instruction Nos. 14.59 and 14.217. For definition of "public agency" see I.C. 5-16-6.5-2.



**Instruction No. 4.69(a). Home Improvement Fraud  
(Misrepresentation).****I.C. 35-43-6-12(a)(1).****I.C. 35-43-6-13(a)(1) and (a)(3).****I.C. 35-43-6-13(b)(2).****I.C. 35-43-6-13(c)(1) and (c)(2).**

The crime of home improvement fraud is defined by law as follows:

A home improvement supplier who enters into a home improvement contract and knowingly misrepresents a material fact relating to [the terms of the home improvement contract] [the (pre-existing) (existing) condition of any part of the property involved, including a misrepresentation concerning the threat of (fire) (structural damage) if the property is not repaired] commits home improvement fraud, a Class B misdemeanor.

[The offense is a Class A misdemeanor:

- when the home improvement contract price is one thousand dollars (\$1,000) or more; or
- if two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

[The offense is a Class D felony if the consumer is at least sixty (60) years of age and the home improvement contract price is ten thousand dollars (\$10,000) or less.]

\*[The offense is a Class C felony:

- if the consumer is at least sixty (60) years of age and the home improvement contract price is more than ten thousand dollars (\$10,000); or
- if the consumer is at least sixty (60) years of age, and two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

Before you may convict the Defendant, the State must have proved

each of the following beyond a reasonable doubt:

1. The Defendant;
2. was a home improvement supplier and
3. entered into a home improvement contract with (*name consumer*) and
4. knowingly
5. misrepresented a material fact relating to

[the terms of the home improvement contract]

[or]

[the pre-existing or existing condition of any part of the property involved (by misrepresenting a threat of {fire} {structural damage} if the property was not repaired)];

- [6. (*for Class A misdemeanor*) and

(the home improvement contract price was one thousand dollars [\$1,000] or more)

(or)

(the Defendant by himself, or with at least one other home improvement supplier, entered into two [2] or more home improvement contracts with [*name consumer*], [as part of] [in furtherance of] a common fraudulent [scheme] [design] [intention] and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]));

[or]

- [7. (*for Class D felony*) ([*name consumer*], the consumer, was at least 60 years of age, and the home improvement contract price was ten thousand dollars [\$10,000] or less.)

[or]

- [8. (*for Class C felony*) ([*name consumer*], the consumer, was at least 60 years of age; and the home improvement contract price was ten thousand dollars [\$10,000] or more)

(or)

(the Defendant by himself, or with at least one other home improvement supplier

○ entered into two [2] or more home improvement con-



tracts with [name consumer]

- ☐ [as part of] [in furtherance of] a common fraudulent [scheme] [design] [intention]
- ☐ and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]
- ☐ and [name consumer], the consumer, was at least 60 years of age).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of home improvement fraud, a Class B/A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

### Comments

A trial of home improvement fraud as a Class A misdemeanor under I.C. 35-43-6-13(a) (2) must be bifurcated. *See* Chapter 15.

The terms “consumer”, “home improvement contract”, “home improvement contract price”, and “home improvement supplier” are defined by law. *See* I.C. 35-43-6-2, I.C. 35-43-6-4, I.C. 35-43-6-5, and I.C. 35-43-6-6; Instruction Nos. 14.27, 14.109, 14.111, and 14.113.

**Instruction No. 4.69(b). Home Improvement Fraud (False Impression).****I.C. 35-43-6-12(a)(2).****I.C. 35-43-6-13(a)(1) and (a)(3).****I.C. 35-43-6-13(b)(2).****I.C. 35-43-6-13(c)(1) and (c)(2).**

The crime of home improvement fraud is defined by law as follows:

A home improvement supplier who enters into a home improvement contract and knowingly [creates] [confirms] a consumer's impression that is false and that the home improvement supplier does not believe to be true commits home improvement fraud, a Class B misdemeanor.

[The offense is a Class A misdemeanor:

- when the home improvement contract price is one thousand dollars (\$1,000) or more; or
- if two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

[The offense is a Class D felony if the consumer is at least sixty (60) years of age and the home improvement contract price is ten thousand dollars (\$10,000) or less.]

[The offense is a Class C felony

- if the consumer is at least sixty (60) years of age and the home improvement contract price is more than ten thousand dollars (\$10,000); or
- if the consumer is at least sixty (60) years of age, and two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant



2. was a home improvement supplier and
3. entered into a home improvement contract with (*name consumer*) and
4. knowingly
5. [created] or [confirmed] (*name consumer*)'s impression that (*state impression*)
6. and such impression was false
7. and the Defendant did not believe it to be true
- [8. (*for Class A misdemeanor*)

and

(the home improvement contract price was one thousand dollars [\$1,000] or more)

(or)

(the Defendant by himself, or with at least one other home improvement supplier, entered into two [2] or more home improvement contracts with [*name consumer*] [as part of] [in furtherance of] a common fraudulent [scheme] [design] [intention] and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]))

- [9. (*for Class D felony*) and [*name consumer*], the consumer, was at least 60 years of age, and the home improvement contract price was ten thousand dollars [\$10,000] or less.]
- [10. (*for Class C felony*)

and

([*name consumer*], the consumer, was at least 60 years of age; and the home improvement contract price was more than ten thousand dollars [\$10,000])

(or)

(the Defendant by himself, or with at least one other home improvement supplier

- ☐ entered into two [2] or more home improvement contracts with [*name consumer*]
- ☐ [as part of] [in furtherance of] a common fraudulent [scheme] [design] [intention]

- ☐ and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]
- ☐ and [name consumer], the consumer, was at least 60 years of age).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of home improvement fraud, a Class B/A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

### Comments

A trial of home improvement fraud as a Class A misdemeanor under I.C. 35-43-6-13(a) (2) must be bifurcated. *See* Chapter 15.

The terms “consumer”, “home improvement contract”, “home improvement contract price”, and “home improvement supplier” are defined by law. *See* I.C. 35-43-6-2, I.C. 35-43-6-4, I.C. 35-43-6-5, and I.C. 35-43-6-6; Instruction Nos. 14.27, 14.109, 14.111, and 14.113.



**Instruction No. 4.69(c). Home Improvement Fraud (False Promise).**

**I.C. 35-43-6-12(a)(3).**

**I.C. 35-43-6-13(a)(1) and (a)(3).**

**I.C. 35-43-6-13(b)(2).**

**I.C. 35-43-6-13(c)(1) and (c)(2).**

The crime of home improvement fraud is defined by law as follows:

A home improvement supplier who enters into a home improvement contract and knowingly promises performance that the home improvement supplier [does not intend to perform] [knows will not be performed] commits home improvement fraud, a Class B misdemeanor.

[The offense is a Class A misdemeanor:

- when the home improvement contract price is one thousand dollars (\$1,000) or more; or
- if two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

[The offense is a Class D felony if the consumer is at least sixty (60) years of age and the home improvement contract price is ten thousand dollars (\$10,000) or less.]

[The offense is a Class C felony

- if the consumer is at least sixty (60) years of age and the home improvement contract price is more than ten thousand dollars (\$10,000); or
- if the consumer is at least sixty (60) years of age, and two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was a home improvement supplier and
3. entered into a home improvement contract with (*name consumer*) and
4. knowingly
5. promised (*name promised performance*)
6. and  
[did not intend to perform as promised]  
[or]  
[knew said promise would not be performed];
- [7. (*for Class A misdemeanor*)  
and  
(the home improvement contract price was one thousand dollars [\$1,000] or more)  
(or)  
(the Defendant by himself, or with at least one other home improvement supplier, entered into two [2] or more home improvement contracts with [*name consumer*] [as part of] [in furtherance of] a common fraudulent [scheme] [design] [intention] and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000])]
- [8. (*for Class D felony*)  
and ([*name consumer*], the consumer, was at least 60 years of age, and the home improvement contract price was ten thousand dollars [\$10,000] or less.);
- [9. (*for Class C felony*)  
and  
([*name consumer*], the consumer, was at least 60 years of age; and the home improvement contract price was *more than* ten thousand dollars [\$10,000])  
(or)  
(the Defendant by himself, or with at least one other home improvement supplier



- ☐ entered into two [2] or more home improvement contracts with [name consumer]
- ☐ [as part of] [in furtherance of] a common fraudulent [scheme] [design] [intention]
- ☐ and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]
- ☐ and [name consumer], the consumer, was at least 60 years of age).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of home improvement fraud, a Class B/A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

### Comments

A trial of home improvement fraud as a Class A misdemeanor under I.C. 35-43-6-13(a) (2) must be bifurcated. *See* Chapter 15.

The terms “consumer”, “home improvement contract”, “home improvement contract price”, and “home improvement supplier” are defined by law. *See* I.C. 35-43-6-2, I.C. 35-43-6-4, I.C. 35-43-6-5, and I.C. 35-43-6-6; Instruction Nos. 14.27, 14.109, 14.111, and 14.113.

**Instruction No. 4.69(d). Home Improvement Fraud (Deception).****I.C. 35-43-6-12(a)(4).****I.C. 35-43-6-13(a)(1) and (a)(3).****I.C. 35-43-6-13(b)(2).****I.C. 35-43-6-13(c)(1) and (c)(2).**

The crime of home improvement fraud is defined by law as follows:

A home improvement supplier who enters into a home improvement contract and knowingly uses or employs any deception, false pretense, or false promise to cause a consumer to enter into a home improvement contract commits home improvement fraud, a Class B misdemeanor.

[The offense is a Class A misdemeanor:

- when the home improvement contract price is one thousand dollars (\$1,000) or more; or
- if two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

[The offense is a Class D felony if the consumer is at least sixty (60) years of age and the home improvement contract price is ten thousand dollars (\$10,000) or less.]

[The offense is a Class C felony

- if the consumer is at least sixty (60) years of age and the home improvement contract price is more than ten thousand dollars (\$10,000); or
- if the consumer is at least sixty (60) years of age, and two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was a home improvement supplier and



3. entered into a home improvement contract with (*name consumer*) and
4. knowingly
5. [used] [employed] a  
[deception]  
[or]  
[false pretense]  
[or]  
[false promise]  
(*describe alleged deception, pretense, or promise*) to cause  
(*name consumer*) to enter into a home improvement contract;
- [6. (*for Class A misdemeanor*) and  
(the home improvement contract price was one thousand dollars [\$1,000] or more)  
(or)  
(the Defendant by himself, or with at least one other home improvement supplier, entered into two [2] or more home improvement contracts with [*name consumer*], [as part of] [in furtherance of] a common fraudulent [scheme] [design] [intention] and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000])
- [7. (*for Class D felony*) and [*name consumer*], the consumer, was at least 60 years of age, and the home improvement contract price was ten thousand dollars [\$10,000] or less.]
- [8. (*for Class C felony*) and  
[*name consumer*], the consumer, was at least 60 years of age; and the home improvement contract price was more than ten thousand dollars [\$10,000]  
(or)  
(the Defendant by himself, or with at least one other home improvement supplier  
☐ entered into two [2] or more home improvement contracts with [*name consumer*]

- ☐ [as part of] [in furtherance of] a common fraudulent [scheme] [design] [intention]
- ☐ and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]
- ☐ and [*name consumer*], the consumer, was at least 60 years of age).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of home improvement fraud, a Class B/A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

### Comments

A trial of home improvement fraud as a Class A misdemeanor under I.C. 35-43-6-13(a) (2) must be bifurcated. *See* Chapter 15.

The terms “consumer”, “home improvement contract”, “home improvement contract price”, and “home improvement supplier” are defined by law. *See* I.C. 35-43-6-2, I.C. 35-43-6-4, I.C. 35-43-6-5, and I.C. 35-43-6-6; Instruction Nos. 14.27, 14.109, 14.111, and 14.113.



**Instruction No. 4.69(e). Home Improvement Fraud (Unconscionable Contract).****I.C. 35-43-6-12(a)(5).****I.C. 35-43-6-13(a)(4).****I.C. 35-43-6-13(b)(2).****I.C. 35-43-6-13(c)(3).**

The crime of home improvement fraud is defined by law as follows:

A home improvement supplier who enters into a home improvement contract and knowingly enters into an unconscionable home improvement contract with a home improvement contract price of four thousand dollars (\$4,000) or more but less than seven thousand (\$7,000) commits home improvement fraud, a Class B misdemeanor.

[The offense is a Class A misdemeanor if the home improvement contract price is at least seven thousand (\$7,000) dollars but less than ten thousand dollars (\$10,000).]

[The offense is a Class D felony if:

- the home improvement contract price is more than ten thousand dollars (\$10,000); or
- the consumer is at least sixty (60) years of age and the home improvement contract price is ten thousand dollars (\$10,000) or less.]

[The offense is a Class C felony if the consumer is at least sixty (60) years of age and the home improvement contract price is more than ten thousand dollars (\$10,000).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was a home improvement supplier and
3. knowingly
4. entered into a home improvement contract with (*name consumer*)
5. and the home improvement contract was unconscionable
6. and the home improvement contract price was four thousand dollars (\$4,000) or more but less than seven thousand (\$7,000)

- [7. (*for Class A misdemeanor*) and the home improvement contract price was at least seven thousand (\$7,000) dollars but less than ten thousand dollars (\$10,000)]
- [8. (*for Class D felony*) and  
 (the home improvement contract price was more than ten thousand dollars [\$10,000])  
 (or)  
 [*name consumer*] the consumer was at least sixty [60] years of age  
 and the home improvement contract price was ten thousand dollars [\$10,000] or less]
- [9. (*for Class C felony*) and (*name of consumer*), the consumer, was at least 60 years of age and the home improvement contract price was more than ten thousand dollars (\$10,000)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of home improvement fraud, a Class B/A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

### Comments

A trial of home improvement fraud as a Class A misdemeanor under I.C. 35-43-6-13(a)(2) must be bifurcated. *See* Chapter 15.

The Committee concludes that A misdemeanor enhancement grounds in I.C. 35-43-6-13(a)(1) and (a)(3) do not apply to this offense, given its \$4,000 minimum contract price threshold.

The terms “consumer”, “home improvement contract”, “home improvement contract price”, and “home improvement supplier”, and “unconscionable home improvement contract” are defined by law. *See* I.C. 35-43-6-2, I.C. 35-43-6-4, I.C. 35-43-6-5, and I.C. 35-43-6-6, I.C. 35-43-6-8, and I.C. 35-43-6-9; Instruction Nos. 14.27, 14.109, 14.111, 14.113, and 14.211.



**Instruction No. 4.69(g). Home Improvement Fraud (Assumed Name)****I.C. 35-43-6-12(a)(6).****I.C. 35-43-6-13(a)(2), (a)(3), and (a)(5).**

The crime of home improvement fraud is defined by statute as follows:

A home improvement supplier who enters into a home improvement contract and knowingly [misrepresents] [conceals] the home improvement supplier's [real name] [business name] [physical or mailing business address] [telephone number] commits home improvement fraud, a Class B misdemeanor.

[The offense is a Class A misdemeanor when two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was a home improvement supplier
3. who entered into a home improvement contract with [name], and
4. knowingly
5. [misrepresented] [concealed] the home improvement supplier's [real name] [business name] [(physical) (mailing) business address] [telephone number]
- [6. (for Class A misdemeanor) and (the Defendant by himself, or with at least one other home improvement supplier, entered into two [2] or more home improvement contracts with [name consumer], [as part of] [in furtherance of] a common fraudulent [scheme] [design] [intention], and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of home improvement fraud, a Class B/A misdemeanor, as charged in Count

**Comments**

A trial of assumed name home improvement fraud as a Class A misdemeanor under I.C. 35-43-6-13(a) (2) must be bifurcated. *See* Chapter 15.

The terms “consumer”, “home improvement contract”, “home improvement contract price”, and “home improvement supplier” are defined by law. *See* I.C. 35-43-6-2, I.C. 35-43-6-4, I.C. 35-43-6-5, and I.C. 35-43-6-6; Instruction Nos. 14.27, 14.109, 14.111, and 14.113.



**Instruction No. 4.69(g)(1). Home Improvement Fraud (Failure to Provide Warranty)**

**I.C. 35-43-6-12(a)(7).**

**I.C. 35-43-6-13(a)(1) and (a)(3).**

**I.C. 35-43-6-13(b)(2).**

**I.C. 35-43-6-13(c)(1) and (c)(2).**

The crime of home improvement fraud is defined by law as follows:

A home improvement supplier who enters into a home improvement contract and knowingly upon request by the consumer, fails to provide the consumer with any copy of a written warranty or guarantee that states [the length of the warranty or guarantee], [the home improvement that is covered by the warranty or guarantee], and [how the consumer could make a claim for a repair under the warranty or guarantee] commits home improvement fraud, a Class B misdemeanor.

[The offense is a Class A misdemeanor:

- when the home improvement contract price is one thousand dollars (\$1,000) or more; or
- if two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

[The offense is a Class D felony if the consumer is at least sixty (60) years of age and the home improvement contract price is ten thousand dollars (\$10,000) or less.]

[The offense is a Class C felony

- if the consumer is at least sixty (60) years of age and the home improvement contract price is more than ten thousand dollars (\$10,000); or
- if the consumer is at least sixty (60) years of age, and two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

Before you may convict the Defendant, the State must have proved

each of the following beyond a reasonable doubt:

1. The Defendant;
2. was a home improvement supplier; and
3. entered into a home improvement contract with (*name consumer*), a consumer; and
4. knowingly;
5. upon a request by (*name consumer*);
6. failed to provide the consumer with any copy of a written warranty or guarantee that stated:

[the length of the warranty or guarantee]

[or]

[the home improvement that was covered by the warranty or guarantee]

[or]

[how the consumer could make a claim for a repair under the warranty or guarantee];

- [7. (*for Class A misdemeanor*) and  
(the home improvement contract price was one thousand dollars [\$1,000] or more)  
(or)

(the Defendant by himself, or with at least one other home improvement supplier, entered into two [2] or more home improvement contracts with [*name consumer*], [as part of] or [in furtherance of] a common fraudulent [scheme], [design], or [intention] and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]);

- [8. (*for Class D felony*) and ([*name consumer*], the consumer, was at least 60 years of age, and the home improvement contract price was ten thousand dollars [\$10,000] or less.);

- [9. (*for Class C felony*) and

([*name consumer*], the consumer, was at least 60 years of age; and the home improvement contract price was more than ten thousand dollars [\$10,000])

(or)



(the Defendant by himself, or with at least one other home improvement supplier

- ☐ entered into two [2] or more home improvement contracts with [name consumer]
- ☐ [as part of] [in furtherance of] a common fraudulent [scheme] [design] [intention]
- ☐ and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]
- ☐ and [name consumer], the consumer, was at least 60 years of age).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of home improvement fraud, a Class B/A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

### Comments

A trial of home improvement fraud as a Class A misdemeanor under I.C. 35-43-6-13(a) (2) must be bifurcated. *See* Chapter 15.

The terms “consumer”, “home improvement contract”, “home improvement contract price”, and “home improvement supplier” are defined by law. *See* I.C. 35-43-6-2, I.C. 35-43-6-4, I.C. 35-43-6-5, and I.C. 35-43-6-6; Instruction Nos. 14.27, 14.109, 14.111, and 14.113.

**Instruction No. 4.69(g)(2). Home Improvement Fraud (Use of Diluted, Modified, or Altered Materials)**

**I.C. 35-43-6-12(a)(8).**

**I.C. 35-43-6-13(a)(1) and (a)(3).**

**I.C. 35-43-6-13(b)(2).**

**I.C. 35-43-6-13(c)(1) and (c)(2).**

The crime of home improvement fraud is defined by law as follows:

A home improvement supplier who enters into a home improvement contract and knowingly uses a product in a home improvement that has been diluted, modified, or altered in a manner that would void the manufacturer's warranty of the product without disclosing to the consumer the reasons for the dilution, modification, or alteration and that the manufacturer's warranty may be compromised commits home improvement fraud, a Class B misdemeanor.

[The offense is a Class A misdemeanor:

- when the home improvement contract price is one thousand dollars (\$1,000) or more; or
- if two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

[The offense is a Class D felony if the consumer is at least sixty (60) years of age and the home improvement contract price is ten thousand dollars (\$10,000) or less.]

[The offense is a Class C felony

- if the consumer is at least sixty (60) years of age and the home improvement contract price is more than ten thousand dollars (\$10,000); or
- if the consumer is at least sixty (60) years of age, and two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

Before you may convict the Defendant, the State must have proved



each of the following beyond a reasonable doubt:

1. The Defendant;
2. was a home improvement supplier and;
3. entered into a home improvement contract with (*name consumer*), a consumer and;
4. knowingly;
5. diluted, modified, or altered a product in the home improvement in a manner that would void the product manufacturer's warranty of the product;
6. without disclosing to (*name consumer*)
  - the reasons for the dilution, modification, or alteration, and
  - that the manufacturer's warranty may have been compromised;
- [7. (*for Class A misdemeanor*) and;  
(the home improvement contract price was one thousand dollars [\$1,000] or more)  
(or)  
(the Defendant by himself, or with at least one other home improvement supplier, entered into two [2] or more home improvement contracts with [*name consumer*], [as part of] or [in furtherance of] a common fraudulent [scheme], [design], or [intention] and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]);
- [8. (*for Class D felony*) and ([*name consumer*], the consumer, was at least 60 years of age, and the home improvement contract price was ten thousand dollars [\$10,000] or less.)
- [9. (*for Class C felony*) and  
([*name consumer*], the consumer, was at least 60 years of age; and the home improvement contract price was more than ten thousand dollars [\$10,000]  
(or)  
(the Defendant by himself, or with at least one other home improvement supplier

- ☐ entered into two [2] or more home improvement contracts with [name consumer]
- ☐ [as part of] or [in furtherance of] a common fraudulent [scheme], [design], or [intention]
- ☐ and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]
- ☐ and [name consumer], the consumer, was at least 60 years of age).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of home improvement fraud, a Class B/A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

### Comments

A trial of home improvement fraud as a Class A misdemeanor under I.C. 35-43-6-13(a) (2) must be bifurcated. *See* Chapter 15.

The terms “consumer”, “home improvement contract”, “home improvement contract price”, and “home improvement supplier” are defined by law. *See* I.C. 35-43-6-2, I.C. 35-43-6-4, I.C. 35-43-6-5, and I.C. 35-43-6-6; Instruction Nos. 14.27, 14.109, 14.111, and 14.113.



#### **4-152.5 OFFENSES AGAINST PROPERTY**

##### **Instruction No. 4.69(g)(3). Home Improvement Fraud (False Claim of Referral, Licensure, or Permit))**

**I.C. 35-43-6-12(a)(9).**

**I.C. 35-43-6-13(a)(1) and (a)(3).**

**I.C. 35-43-6-13(b)(2).**

**I.C. 35-43-6-13(c)(1) and (c)(2).**

The crime of home improvement fraud is defined by law as follows:

A home improvement supplier who enters into a home improvement contract and knowingly falsely claims to a consumer that the home improvement supplier [was referred to the consumer by a contractor who previously worked for the consumer] [is licensed, certified, or insured] [has obtained all necessary permits or licenses before starting a home improvement], commits home improvement fraud, a Class B misdemeanor.

[The offense is a Class A misdemeanor:

- when the home improvement contract price is one thousand dollars (\$1,000) or more; or
- if two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

[The offense is a Class D felony if the consumer is at least sixty (60) years of age and the home improvement contract price is ten thousand dollars (\$10,000) or less.]

[The offense is a Class C felony

- if the consumer is at least sixty (60) years of age and the home improvement contract price is more than ten thousand dollars (\$10,000); or
- if the consumer is at least sixty (60) years of age, and two (2) or more home improvement contracts exceed an aggregate amount of one thousand dollars (\$1,000) and are entered into with the same consumer by one (1) or more suppliers as part of or in furtherance of a common fraudulent scheme, design, or intention.]

Before you may convict the Defendant, the State must have proved

each of the following beyond a reasonable doubt:

1. The Defendant;
2. was a home improvement supplier and;
3. entered into a home improvement contract with *(name consumer)*, a consumer and;
4. knowingly;
5. falsely claimed to *(name consumer)*, a consumer, that Defendant

[was referred to *(name consumer)* by a contractor who had previously worked for *(name consumer)*]

[or]

[was (licensed), (certified), or (insured)]

[or]

[had obtained all necessary permits or licenses before starting the home improvement];

- [6. *(for Class A misdemeanor)* and

(the home improvement contract price was one thousand dollars [\$1,000] or more)

(or)

(the Defendant by himself, or with at least one other home improvement supplier, entered into two [2] or more home improvement contracts with *[name consumer]*, [as part of] or [in furtherance of] a common fraudulent [scheme], [design], or [intention] and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000])

- [7. *(for Class D felony)* and (*[name consumer]*, the consumer, was at least 60 years of age, and the home improvement contract price was ten thousand dollars [\$10,000] or less.)

- [8. *(for Class C felony)* and

(*[name consumer]*, the consumer, was at least 60 years of age; and the home improvement contract price was more than ten thousand dollars [\$10,000])

[(or)

(the Defendant by himself, or with at least one other home improvement supplier



- ☐ entered into two [2] or more home improvement contracts with [name consumer]
- ☐ [as part of] or [in furtherance of] a common fraudulent [scheme], [design], or [intention]
- ☐ and the aggregate amount of the contracts exceeded one thousand dollars [\$1,000]
- ☐ and [name consumer], the consumer, was at least 60 years of age.)]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of home improvement fraud, a Class B/A misdemeanor/D/C felony, as charged in Count \_\_\_\_\_.

### Comments

A trial of home improvement fraud as a Class A misdemeanor under I.C. 35-43-6-13(a) (2) must be bifurcated. *See* Chapter 15.

The terms “consumer”, “home improvement contract”, “home improvement contract price”, and “home improvement supplier” are defined by law. *See* I.C. 35-43-6-2, I.C. 35-43-6-4, I.C. 35-43-6-5, and I.C. 35-43-6-6; Instruction Nos. 14.27, 14.109, 14.111, and 14.113.

**Instruction No. 4.69(h). Home Improvement Fraud (Illegal Practices to Obtain Home Improvement Contract)**

**I.C. 35-43-6-12(b)(1)–(4).**

**I.C. 35-43-6-13(b)(4).**

The crime of home improvement fraud is defined by law as follows:

A home improvement supplier who, with the intent to enter into a home improvement contract, knowingly [damages the property of a consumer] [does work on the property of a consumer without the consumer's prior authorization] [misrepresents that (the supplier) (another person) is an (employee) (agent) of (the federal government) (the state) (a political subdivision of the state) (any other governmental agency or entity)] [misrepresents that (the supplier) (another person) is an (employee) (agent) of any (private) (public) utility] commits home improvement fraud, a Class A misdemeanor. [The offense is a Class D felony if the consumer is at least sixty (60) years of age.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was a home improvement supplier; and
3. with the intent to enter into a home improvement contract with [name], a consumer
4. knowingly
5. [damaged the property of (name of consumer)]

[or]

[did work on the property of (name of consumer) without (name's) prior authorization]

[or]

[misrepresented that (he, the Defendant, or name of other person alleged) was an employee or agent of (the federal government) (of the state) (of a political subdivision of the state) (name alleged agency or entity, a governmental (agency) (entity))]

[or]

[misrepresented that (he, the Defendant) (name of other person alleged) was an employee or agent of (name) which was



a private or public utility.]

[6. (for Class D felony) and (name of consumer) was at least sixty years of age].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of home improvement fraud, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

(Text continued on page 4-153)

[The following text is extremely faint and largely illegible. It appears to be a multi-paragraph document, possibly a report or a letter, with several lines of text per paragraph. The content is too blurry to transcribe accurately.]



**Comments**

The terms "consumer," "home improvement contract," and "home improvement supplier" are defined by law. See I.C. 35-43-6-2, I.C. 35-43-6-4, and I.C. 35-43-6-6; Instruction Nos. 14.27, 14.109, and 14.113.

**Instruction No. 4.71. Timber Spiking.****I.C. 35-43-8-2, I.C. 35-43-8-3**

The crime of timber spiking is defined by law as follows:

A person who [recklessly] [knowingly] [intentionally] without [claim] [right] [consent of the owner] [drives] [places] [fastens] in timber a device of [metal] [ceramic] [other substance] sufficiently hard to damage equipment used in the processing of timber to wood products, with the intent to hinder the [felling] [logging] [processing] of timber, commits timber spiking, a Class D felony. [The offense is a Class C felony if it causes bodily injury to another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. without [claim] [right] [consent of (*name owner*)]
4. [drove] [placed] [fastened] in timber
5. a device of [metal] [ceramic] [*name other substance*] sufficiently hard to damage equipment used in the processing of timber into wood products
6. with the intent to hinder the [felling] [logging] [processing] of timber
7. (*for Class C felony*) and the offense caused bodily injury to (*name*), as follows: (*describe injury*)).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of timber spiking, a Class D/C felony as charged in Count \_\_\_\_\_.



**Comments**

The terms "bodily injury" and "timber" are defined by law. See I.C. 35-41-1-4 and I.C. 35-43-8-1; Instruction Nos. 14.13 and 14.204.

**Instruction No. 4.73. Devices to Obtain Cable Television Without Payment.****I.C. 35-43-5-6-5.**

The crime of providing a device to obtain cable television without payment is defined by law as follows:

A person who [manufactures] [distributes] [sells] [leases] [offers for (sale) (lease)] [a device] [a kit of parts to construct a device] designed [in whole] [in part] to [intercept] [unscramble] [decode] a transmission by a cable television system with the intent that the [device] [kit] be used to obtain cable television system services without full payment to the cable television system commits a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [manufactured] [distributed] [sold] [leased] [offered for (sale) (lease)]
3. a [device] [kit of parts to construct a device]
4. designed [in whole] [in part] to [intercept] [unscramble] [decode] a transmission by a cable television system
5. with the intent that the [device] [kit] be used to obtain cable television services without full payment to the cable television system.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of providing a device to obtain cable television without payment, a Class D felony, as charged in Count \_\_\_\_\_.



**Instruction No. 4.75(a). Unauthorized Use of Telecommunication Services (Making Unlawful Telecommunication Devices).**

**I.C. 35-45-13-7(1).**

The crime of unauthorized use of telecommunications services is defined by law as follows:

A person who [knowingly] [intentionally] [makes] [distributes] [possesses] [uses] [assembles] an unlawful telecommunications device that is [designed] [adapted] [used ] to:

[commit a theft of telecommunications service]

[or]

[(acquire) (facilitate the acquisition of) telecommunications service without the consent of the telecommunications service provider]

[or]

[(conceal) (assist another in concealing) from(a telecommunication services provider or authority) (another person with enforcement authority) the (existence) (place of origin) (destination) of telecommunications]

commits unauthorized use of telecommunication services, a Class A misdemeanor. [If the commission of the offense involves at least five (5) unlawful telecommunications devices the offense is a Class D felony.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [made]  
[or]  
[distributed]  
[or]  
[possessed]  
[or]  
[used]  
[or]  
[assembled]
4. [an unlawful telecommunications device that was] [unlawful telecommunications devices that were] [designed] [adapted] [used] to:  
[commit a theft of telecommunications service]

[or]

[(acquire) (facilitate the acquisition of) telecommunications service without the consent of the telecommunications service provider]

[or]

[(conceal) (assist another in concealing) from

[a telecommunication services (provider) (authority)]

[another person with enforcement authority]

the (existence) (place of origin) (destination) of telecommunications]

[5. (for Class D felony) and at least five (5) unlawful telecommunications devices were involved].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of unauthorized use of telecommunications services, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.



**Comments**

The terms "manufacture of an unlawful telecommunications device," "publish," "telecommunications device," "telecommunications service," "telecommunications service provider," and "unlawful telecommunications device" are defined by law. See I.C. 35-45-13-1, 35-45-13-2, 35-45-13-3, 35-45-13-4, 25-45-13-5, and 35-45-13-6; Instruction Nos. 14.130, 14.170, 14.202, 14.202a, 14.202b, and 14.214.

**Instruction No. 4.75(b). Unauthorized Use of Telecommunication Services (Sale of Unlawful Telecommunications Device).**

**I.C. 35-45-13-7(1).**

The crime of unauthorized use of telecommunications services is defined by law as follows:

A person who [knowingly] [intentionally] [sells] [possesses] [distributes] [gives] [transports] [otherwise transfers] to another or [offers] [advertises] for sale an unlawful telecommunications device, [with the intent to use the unlawful telecommunications device to] [with the intent to allow the unlawful telecommunications device to be used to] [while knowing or having reason to believe that the unlawful telecommunications device is intended to be used to]:

[commit a theft of telecommunications service]

[or]

[(acquire) (facilitate the acquisition of) telecommunications service without the consent of the telecommunications service provider]

[or]

[(conceal) (assist another in concealing) from (a telecommunications services provider or authority) (another person with enforcement authority) the (existence) (place of origin) (destination) of telecommunications]

commits unauthorized use of telecommunications services, a Class A misdemeanor. [The offense is a Class D felony if it involves at least five (5) unlawful telecommunications devices.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [sold]  
[or]  
[possessed]  
[or]  
[distributed]  
[or]  
[gave]  
[or]



[transported]

[or]

[transferred to another]

[or]

[(offered) (advertised) for sale]

4. an unlawful telecommunications device

5. [with the intent to use the unlawful telecommunications device to]

[or]

[with the intent to allow the unlawful telecommunications device to be used to]

[or]

[while knowing or having reason to believe that the unlawful telecommunications device was intended to be used to]

6. [commit a theft of telecommunications service]

[or]

[(acquire) (facilitate the acquisition of) telecommunications service without the consent of the telecommunications service provider]

[or]

[(conceal) (assist another in concealing) from

(a telecommunication services provider or authority)

(or)

(another person with enforcement authority)

the

(existence)

(or)

(place of origin)

(or)

(destination)

of telecommunications

[7. (for Class D felony) and at least five (5) unlawful telecommunication devices were involved].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of unauthorized use of telecommunications services, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms "manufacture of an unlawful telecommunications device," "publish," "telecommunications device," "telecommunications service," "telecommunications service provider," and "unlawful telecommunications device" are defined by law. See I.C. 35-45-13-1, 35-45-13-2, 35-45-13-3, 35-45-13-4, 35-45-13-5, and 35-45-13-6; Instruction Nos. 14.130, 14.170, 14.202, 14.202a, 14.202b, and 14.214.



**Instruction No. 4.75 (c). Unauthorized Use of Telecommunication Services (Unlawful Plans or Instructions).**

**I.C. 35-45-13-7(2)(B).**

The crime of Unauthorized Use of Telecommunication Services is defined by law as follows:

A person who [knowingly] [intentionally] [sells] [possesses] [distributes] [gives] [transports] [otherwise transfers] to another or [offers] [advertises] for sale plans or instructions for making or assembling an unlawful telecommunications device, knowing or having reason to believe that the plans or instructions are intended to be used for making or assembling an unlawful telecommunications device, commits unauthorized use of telecommunications services, a Class A misdemeanor. [The offense is a Class D felony if it involves at least five (5) unlawful telecommunications devices.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [sold]  
[or]  
[possessed]  
[or]  
[distributed]  
[or]  
[gave]  
[or]  
[transported]  
[or]  
[transferred to another]  
[or]  
[(offered) (advertised) for sale]
4. plans or instructions for making or assembling an unlawful telecommunications device
5. when the Defendant [knew] [had reason to believe] that the plans or instructions were intended to be used for making or assembling an unlawful telecommunications device
6. and at least five (5) unlawful telecommunication devices were involved.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of unauthorized use of

telecommunications services, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.



**Comments**

The terms "manufacture of an unlawful telecommunications device," "publish," "telecommunications device," "telecommunications service," "telecommunications service provider," and "unlawful telecommunications device" are defined by law. See I.C. 35-45-13-1, 35-45-13-2, 35-45-13-3, 35-45-13-4, 35-45-13-5, and 35-45-13-6; Instruction Nos. 14.130, 14.170, 14.202, 14.202a, 14.202b, and 14.214.

**Instruction No. 4.75(d). Unauthorized Use of Telecommunication Services (Providing Materials).**

**I.C. 35-45-13-7(2)(C).**

The crime of Unauthorized Use of Telecommunication Services is defined by law as follows:

A person who [knowingly] [intentionally] [sells] [possesses] [distributes] [gives] [transports] [otherwise transfers] to another or [offers] [advertises] for sale material, including [hardware] [cables] [tools] [data] [computer software] [other information or equipment], knowing that the purchaser or a third person intends to use the material in the manufacture of an unlawful telecommunications device, commits unauthorized use of telecommunications services, a Class A misdemeanor. [The offense is a class D felony if it involves at least five (5) unlawful telecommunications devices.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [sold]  
[or]  
[possessed]  
[or]  
[distributed]  
[or]  
[gave]  
[or]  
[transported]  
[or]  
[transferred to another]  
[or]  
[(offered) (advertised) for sale]
4. material, including  
[hardware]  
[or]  
[cables]  
[or]  
[tools]  
[or]  
[data]



[computer software]

[or]

[other information or equipment]

5. when the Defendant [knew] that [name], [the purchaser] [a third person] intended to use the material in the manufacture of an unlawful telecommunications device
16. (*for Class D felony*) and at least five (5) unlawful telecommunication devices were involved].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of unauthorized use of telecommunications services, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms "manufacture of an unlawful telecommunications device," "publish," "telecommunications device," "telecommunications service," "telecommunications service provider," and "unlawful telecommunications device" are defined by law. See I.C. 35-45-13-1, 35-45-13-2, 35-45-13-3, 35-45-13-4, 35-45-13-5, and 35-45-13-6; Instruction Nos. 14.130, 14.170, 14.202, 14.202a, 14.202b, and 14.214.



**Instruction No. 4.75(e). Unauthorized Use of Telecommunication Services (Publishing Information).**

**I.C. 35-45-13-7(3)(A)&(B).**

The crime of unauthorized use of telecommunication services is defined by law as follows:

A person who [knowingly] [intentionally] publishes [the (number) (code) of (an existing) (a canceled) (a revoked) (a nonexistent) (telephone number) (credit number) (other credit device)] [the method of (numbering) (coding) that is employed in the issuance of (telephone numbers) (credit numbers) (other credit devices)] with (knowledge) (reason to believe) that the information may be used to avoid the payment of a lawful (telephone) (telegraph) toll charge] commits unauthorized use of telecommunication services, a Class A misdemeanor. [The offense is a Class D felony if the commission of the offense involves at least five (5) unlawful telecommunications devices.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. published
4. [the  
    (number)  
    (or)  
    (code)  
of  
    (an existing)  
(or)  
    (a canceled)  
    (or)  
    (a revoked)  
    (or)  
    (a nonexistent)  
(telephone number)  
(or)  
(credit number)  
(or)  
(other credit device)]  
[or]

[the method of  
(numbering)

(or)

(coding)

that is employed in the issuance of  
(telephone numbers)

(or)

(credit numbers)

(or)

(other credit devices)]

5. when the Defendant [knew] [had reason to believe] that the information might be used to avoid the payment of a lawful (telephone) (telegraph) toll charge
6. [*for Class D felony*] and at least five (5) unlawful telecommunications devices were involved].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of unauthorized use of telecommunications services, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.



**Comments**

The terms "manufacture of an unlawful telecommunications device," "publish," "telecommunications device," "telecommunications service," "telecommunications service provider," and "unlawful telecommunications device" are defined by law. See I.C. 35-45-13-1, 35-45-13-2, 35-45-13-3, 35-45-13-4, 35-45-13-5, and 35-45-13-6; Instruction Nos. 14.130, 14.170, 14.202, 14.202a, 14.202b, and 14.214.

**Instruction No. 4.77. Cave Mischief.****I.C. 35-43-1-3.**

The crime of cave mischief is defined by law as follows:

A person who knowingly and without the express consent of the cave owner:

[(disfigures) (destroys) (removes) any (stalagmite) (stalactite) (other naturally occurring mineral deposit formation) (archeological) (paleontological) artifact in a cave for other than scientific purposes] [breaks any (lock) (gate) (fence) (other structure) designed to control or prevent access to a cave] [deposits (trash) (rubbish) (chemicals) (other litter) in a cave] [(destroys) (injures) (removes) (harasses) any cave-dwelling animal for other than a scientific purposes] commits cave mischief, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly
3. without the express consent of (*name*), the cave owner
4. [ (disfigured)

(or)

(destroyed)

(or)

(removed)

a

(stalagmite)

(or)

(stalactite)

(or)

[(*describe other naturally occurring mineral deposit formation*), which was a naturally occurring mineral deposit formation]

(or)

[(*describe artifact alleged*)], which was an [archeological] [paleontological] artifact)

in a cave for other than scientific purposes]

[or]

[broke a (lock) (gate) (fence) (structure designed to control or prevent access to a cave)]

[or]

[deposited (trash) (rubbish) (chemicals) (other litter) in a cave]



[or]

[(destroyed) (injured) (removed) (harrassed) a (*describe animal alleged*),  
which was a cave dwelling animal, for other than scientific purposes].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of cave mischief, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Comments**

The terms "cave," "owner," and "scientific purposes" are defined by law for this offense as follows:

"Cave" means any naturally occurring subterranean cavity, including a cavern, pit, pothole, sinkhole, well, grotto, and tunnel whether or not it has a natural entrance.

"Owner" means the person who holds title to or is in possession of the land on or under which a cave is located, or his lessee or agent.

"Scientific purposes" means exploration and research conducted by persons affiliated with recognized scientific organizations with the intent to advance knowledge and with the intent to publish the results of said exploration or research in an appropriate medium.

I.C. 35-43-1-3.



**Instruction No. 4.78. Unlawful Procurement of Government Contract.**

**I.C. 35-43-5-11.**

The crime of unlawful procurement of government contract is defined by law as follows:

A person who [knowingly] [intentionally] provides false information to a governmental entity to obtain a contract from the governmental entity commits unlawful procurement of government contract, a Class A misdemeanor. [The offense is a Class D felony if the provision of false information results in financial loss to the governmental entity.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. for the purpose of obtaining a contract from (*name the governmental entity*), which was a governmental entity
4. provided to (*name the governmental entity*)
5. information that (*state the information*)
- 6 and the information Defendant provided was false
- [7. (*for Class D felony*) and provision of the false information resulted in a financial loss to (*name the governmental entity*).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of unlawful procurement of government contract, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

**Comments**

The term "governmental entity" is defined by law. See I.C. 35-41-1-12; Instruction No. 14.99.



**Instruction No. 4.79. Impairment of Identification.****I.C. 35-43-7-4.**

The crime of impairment of identification is defined by law as follows:

A person who [intentionally] [knowingly] [conceals] [alters] [damages] [removes] an identification number of a product with the intent to conceal the identity of the product and without the consent of the original manufacturer of the product commits impairment of identification, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [intentionally] [knowingly]
3. [concealed]  
[or]  
[altered]  
[or]  
[damaged]  
[or]  
[removed]
4. on identification number of (*name the product*)
5. with the intent to conceal the identity of that product
6. and without the consent of (*name the manufacturer*), the original manufacturer of (*name the product*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of impairment of identification, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Instruction No. 4.81. Receiving Property With Concealed or Altered Identification Number.**

**I.C. 35-43-7-5.**

The crime of receiving unidentified property is defined by law as follows:

A person who [intentionally] [knowingly] [receives] [possesses] a product on which the identification number of the product has been [concealed] [altered] [damaged] [removed] with the intent to conceal the identity of the product and without the consent of the original manufacturer of the product commits receiving unidentified property, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [intentionally] [knowingly]
3. [received] [possessed] (*name the product*)
4. when the identification number on the product had been  
[concealed]  
[or]  
[altered]  
[or]  
[damaged]  
[or]  
[removed]  
with the intent to conceal the identity of the product  
and  
without the consent of (*name*), the original manufacturer.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of receiving unidentified property, a Class A misdemeanor as charged in Count \_\_\_\_\_.



**Instruction No. 4.83. Theft of Title Insurance Funds.****I.C. 35-43-9-7.**

The crime of theft of title insurance funds is defined by law as follows:

[(An officer) (a director) (an employee) of a title insurer] [an individual associated with the title insurer as an independent contractor] [a title insurance agent] who [knowingly] [intentionally] [(converts) (misappropriates) money (received) (held) in a title insurance escrow account] [(receives) (conspires to receive) money (received) (held) in a title insurance escrow account] commits a Class D felony.

[The offense is a Class C felony if the amount of money (converted) (misappropriated) (received) (for which there is a conspiracy) is more than ten thousand dollars (\$10,000) but less than one hundred thousand dollars (\$100,000).]

[The offense is a Class B felony if the amount of money (converted) (misappropriated) (received) (for which there is a conspiracy) is at least one hundred thousand dollars (\$100,000).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when Defendant was  
 [(an officer) (a director) (an employee) of a title insurer]  
 [or]  
 [an individual associated with the title insurer as an independent contractor]  
 [or]  
 [a title insurance agent]
3. [knowingly] [intentionally]
4. [(converted) (misappropriated) money (received) (held) in a title insurance escrow account]  
 [(received) (conspired to receive) money (received) (held) in a title insurance escrow account]
5. (for Class C felony) and the money [(converted) (misappropriated) (received) (for which there was a conspiracy to receive) was more than ten thousand dollars (\$10,000) but less than one hundred thousand dollars (\$100,000)]
6. (for Class B felony) and the money (converted) (misappropriated) (received) (for which there was a conspiracy to receive) was at least one hundred thousand dollars (\$100,000)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of theft of title insurance funds, a Class D/C/B felony, as charged in Count \_\_\_\_\_.

**Comments**

The terms "title insurance agent," "title insurance escrow account," and "title insurer" are defined by law. See I.C. 35-43-9-6; Instruction Nos. 14.204a, 14.204b, and 14.204c.



**Instruction No. 4.85(a). Deception (Permitting Deposit in Insolvent Institution).****I.C. 35-43-5-3(a)(1).**

The crime of deception is defined by law as follows:

A person who, being an [officer] [office manager] [other person participating in the direction of a credit institution], [receives] [permits the receipt] of [a deposit] [other investment] knowing that the institution is insolvent, commits Deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when Defendant was an [officer] [office manager] [a person participating in the direction] of (*name*), a credit institution
3. [knowingly] [intentionally]
4. [received] [permitted receipt] of [a deposit] [other investment]
5. when the Defendant knew that (*name*), a credit institution, was insolvent.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of deception, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Comments**

The term "credit institution" is defined by law. See I.C. 35-41-1-5; Inst. No. 14.39.



**Instruction No. 4.85(b). Deception (False Statements).****I.C. 35-43-5-3(a)(2).**

The crime of deception is defined by law as follows:

A person who [knowingly] [intentionally] makes a [false] [misleading] statement with intent to obtain [property] [employment] [educational opportunity] commits deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. made a [false] [misleading] statement, (*describe statement*)
4. with the intent to obtain [property] [employment] [educational opportunity].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of deception, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Instruction No. 4.85(c). Deception (Misapplication of Property).****I.C. 35-43-5-3(a)(3).**

The crime of deception is defined by law as follows:

A person who misapplies [entrusted property] [property of a governmental entity] [property of a credit institution] in a manner that [the person knows is unlawful] [the person knows involves a substantial risk of (loss) (detriment)] to either (the owner of the property) (a person for whose benefit the property was entrusted)] commits Deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. misapplied
3. [entrusted property to (name)]  
[or]  
[property of (name), a governmental entity]  
[or]  
[property of (name), credit institution]
4. in a manner  
[the Defendant knew was unlawful]  
[or]  
[the Defendant knew involved a substantial risk of (loss) (detriment) to (name), (the owner of the property) (the person for whom the property was entrusted)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of deception, a Class A misdemeanor as charged in Count \_\_\_\_\_.



**Comments**

The terms "governmental entity" and "credit institution" are defined by law. See I.C. 35-41-1-12 and 35-41-1-5; Instruction Nos. 14.99 and 14.39.

**Instruction No. 4.85(d). Deception (False Weights or Measures)****I.C. 35-43-5-3(a)(4).**

The crime of deception is defined by law as follows:

A person who [knowingly] [intentionally] in the regular course of business [(uses) (possesses for use) a false (weight) (measure) (other device for falsely determining or recording the quality or quantity of any commodity)] [(sells) (offers for sale) (displays for sale) (delivers) less than the represented quality or quantity of any commodity] commits Deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. in the regular course of business
4. [(used) (possessed for use) a false  
(weight)  
(or)  
(measure)  
(or)  
(other device for falsely determining or recording the [quality or quantity of a commodity])]  
[or]  
[(sold) (offered for sale) (displayed for sale) (delivered) less than the represented quality or quantity of (*name commodity*), a commodity].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of deception, a Class A misdemeanor, as charged in Count \_\_\_\_\_.



**Instruction No. 4.85(e). Deception (Fraudulently Obtaining Utilities).****I.C. 35-43-5-3(a)(5).**

The crime of deception is defined by law as follows:

A person who, with intent to defraud another person furnishing [electricity] [gas] [water] [telecommunications] [other utility service], avoids a lawful charge for that service by [a scheme] [a device] [tampering with (facilities) (equipment) of the person furnishing service] commits deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to defraud (*name*), a person who was furnishing [electricity]  
[or]  
[gas]  
[or]  
[water]  
[or]  
[telecommunications]  
[or]  
[other utility service]
3. avoided a lawful charge for that service
4. by  
[(*describe scheme or device*)]  
[or]  
[tampering with the (facilities) (equipment) of (*name*), the person furnishing service].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Deception, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Instruction No. 4.85(f). Deception (Misrepresentation of Identity, Quality of Property).****I.C. 35-43-5-3(a)(6).**

The crime of deception is defined by law as follows:

A person who, with intent to defraud, misrepresents [his/her identity] [the identity of another person] [the identity or quality of property] commits Deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
  2. with the intent to defraud
  3. misrepresented
- [Defendant's identity]  
[the identity of (*name the other person*)]  
[the (identity) (quality) of (*describe the property alleged*)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of deception, a Class A misdemeanor, as charged in Count \_\_\_\_\_.



**Instruction No. 4.85(g). Deception (Depositing Slugs).****I.C. 35-43-5-3(a)(7).**

The crime of deception is defined by law as follows:

A person who with intent to defraud an owner of a coin machine, deposits a slug in that machine commits Deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to defraud (*name*), the owner of a coin machine
3. deposited a slug into that machine.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Deception, a Class A misdemeanor as charged in Count \_\_\_\_\_.

**Comment**

The term "coin machine" is defined by law. See I.C. 35-43-5-1; Instruction No. 14.17c.



**Instruction No. 4.85(g). Deception (Possessing Slugs).****I.C. 35-43-5-3(a)(8).**

The crime of deception is defined by law as follows:

A person who, with intent to enable the [person] [another person] to deposit a slug in a coin machine, [makes] [possesses] [disposes of] a slug, commits deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to enable [Defendant] [another person] to deposit a slug in a coin machine
3. [made] [possessed] [disposed of] a slug.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of deception, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Instruction No. 4.85(h). Deception (False Advertising).****I.C. 35-43-5-3(a)(9).**

The crime of deception is defined by law as follows:

A person who disseminates to the public an advertisement that the person knows is [false] [misleading] [deceptive], with intent to promote [the (purchase) (sale) of property] [the acceptance of employment], commits deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to promote  
[the (purchase) (sale) of property]  
[or]  
[the acceptance of employment]
3. disseminated to the public an advertisement
4. that the Defendant knew was [false] [misleading] [deceptive].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of deception, a Class A misdemeanor, as charged in Count \_\_\_\_\_.



**Comments**

I.C. 35-43-5-3(b) provides:

In determining whether an advertisement is false, misleading, or deceptive under subsection (a)(9), there shall be considered, among other things, not only representations contained or suggested in the advertisement, by whatever means, including device or sound, but also the extent to which the advertisement fails to reveal material facts in the light of the representations.

**Instruction No. 4.85(i). Deception (Misrepresentation as a Physician).****I.C. 35-43-5-3(a)(10).**

The crime of deception is defined by law as follows:

A person who, with intent to defraud, misrepresents a person as being a physician licensed under I.C. 25-22.5 commits deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to defraud
3. misrepresented (*name the person*) as being a physician licensed under Indiana law.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of deception, a Class A misdemeanor as charged in Count \_\_\_\_\_.



**Instruction No. 4.85(j). Deception (Defrauding Cable TV Provider).****I.C. 35-43-5-3(a)(11).**

The crime of deception is defined by law as follows:

A person who [knowingly] [intentionally] defrauds another person furnishing cable TV service by avoiding paying compensation for that service [by any (scheme) (device)] [by tampering with (facilities) (equipment) of the person furnishing the service] commits deception, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. defrauded (*name*), a furnisher of cable TV service
4. by avoiding paying compensation for that service

[by a (scheme to) (device which) (*describe alleged scheme or device*)

[or]

[by tampering with (facilities) (equipment) of (*name*), who was furnishing the cable TV service].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of deception, a Class A misdemeanor, as charged in Count \_\_\_\_\_.

**Instruction No. 4.86. Identity Deception.**

**I.C. 35-43-5-3.5.**

The crime of identity deception is defined by law as follows:

A person who [knowingly] [intentionally] [obtains] [possesses] [transfers] [uses] the identifying information of another person, including the identifying information of a person who is deceased, without the other person's consent and with intent to ([harm] [defraud] another person) (assume the identity of another person) (profess to be another person) commits identity deception, a Class D felony.

[The offense is a Class C felony if the person (obtains) (possesses) (transfers) (uses) the identifying information of more than one hundred (100) persons.]

[The offense is a Class C felony if the fair market value of the fraud or harm caused by the offense is at least fifty thousand dollars (\$50,000).]

[The offense is a Class C felony if the identifying information (obtained) (possessed) (transferred) (used) is that of a person under eighteen (18) years of age who is (the person's son or daughter) (a dependent of the person) (a ward of the person) (an individual for whom the person is a guardian).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt

1. The Defendant
2. [knowingly] [intentionally]
3. [obtained] [possessed] [transferred] [used] the identifying information of  
(*name*)
4. without (*name*)'s consent
5. with intent to

harm or defraud (*name person intended to be harmed*)

[or]

[assume the identity of (*name*), another person]

[or]

[profess to be (*name*), another person].

- [6. (*for Class C felony*)

and the Defendant (obtained) (possessed) (transferred) (used) the  
identifying information of more than on hundred (100) persons

(or)

the fair market value of the fraud or harm caused by the offense was at least  
fifty thousand dollars (\$50,000)



(or)

(the identifying information the Defendant {obtained} {possessed} {transferred} {used} was that of a person under eighteen (18) years of age who was

{(name), the Defendant's (son) (daughter)}

{or}

{(name), a dependent of the Defendant}

{or}

{(name), a ward of the Defendant}

{or}

{(name), an individual for whom the Defendant was a guardian}.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Identity deception, a Class D/C felony as charged in Count \_\_\_\_\_.

### Comments

The term "identifying information" is defined by law. See I.C. 35-43-5-1; Instruction No. 14.117.2.

The conduct prohibited in subsection (a) does not apply to:

- (1) a person less than twenty-one (21) years of age who uses the identifying information of another person to acquire an alcoholic beverage (as defined in IC 7.1-1-3-5);
- (2) a minor (as defined in IC 35-49-1-4) who uses the identifying information of another person to acquire:
  - (A) a cigarette or tobacco product (as defined in IC 6-7-2-5);
  - (B) a periodical, a videotape, or other communication medium that contains or depicts nudity (as defined in IC 35-49-1-5);
  - (C) admittance to a performance (live or film) that prohibits the attendance of the minor based on age; or
  - (D) an item that is prohibited by law for use or consumption by a minor; or
- (3) any person who uses the identifying information for a lawful purpose.

The Committee believes that this "does not apply" provision was intended by the legislature to establish "exceptions" to criminal liability under this section. The burden to prove an exemption or exception to a crime has been held to be a defendant's by a preponderance of the evidence. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999) ; *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001).

**Instruction No. 4.86a. Possession of Card Skimming Device.**

**I.C. 35-43-5-4.3.**

The crime of possession of a card skimming device is defined by law as follows:

A person who possesses a card skimming device with intent to commit [(identity deception, I.C. 35-43-5-3.5), (fraud, I.C. 35-43-5-4), commits possession of a card skimming device, a Class D felony] [(terroristic deception, I.C. 35-43-5-3.6), commits possession of a card skimming device, a Class C felony].

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. possessed;
3. a card skimming device;
4. with the intent to commit

[(for Class D felony) identity deception, by (knowingly) or (intentionally) (obtaining), (possessing), (transferring), or (using) the identifying information of another person, including the identifying information of a person who is deceased, without the other person's consent and with intent to ({harm} or {defraud} another person), (assume the identity of another person), or (profess to be another person)]

[or]

[(for Class D felony) fraud, by (obtain elements of particular type of fraud alleged from Instruction Nos. 4.45(a) to 4.55(i))

[or]

[(for Class C felony) terroristic deception, by (knowingly) or (intentionally) (obtaining), (possessing), (transferring), or (using) the identifying information of another person with intent to (commit terrorism) or (obtain or transport a weapon of mass destruction)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a card skimming device, a Class D/C felony as charged in Count \_\_\_\_\_.

**Comments**

The terms "card skimming device" and "identifying information" are defined by law. See I.C. 35-43-5-4.3 and I.C. 35-43-5-1; Instruction Nos. 14.15.1 and 14.117.2.



**Instruction No. 4.86.2. Synthetic Identity Deception.****I.C. 35-43-5-3.8.**

The crime of synthetic identity deception is defined by law as follows:

A person who [knowingly] [intentionally] [obtains] [possesses] [transfers] [uses] synthetic identifying information with intent to ([harm] [defraud] another person) (assume the identity of another person) (profess to be another person) commits synthetic identity deception, a Class D felony.

[The offense is a Class C felony if the person (obtains) (possesses) (transfers) (uses) the synthetic identifying information of more than one hundred (100) persons.]

[The offense is a Class C felony if the fair market value of the fraud or harm caused by the offense is at least fifty thousand dollars (\$50,000).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [obtained] [possessed] [transferred] [used] synthetic identifying information
4. with intent to

[harm or defraud (*name person intended to be harmed*)]

[or]

[assume the identity of (*name*), another person]

[or]

[profess to be (*name*), another person].

- [6. (*for Class C felony*)

and the Defendant (obtained) (possessed) (transferred) (used) the identifying information of more than one hundred (100) persons

(or)

the fair market value of the fraud or harm caused by the offense was at least fifty thousand dollars (\$50,000)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Identity deception, a Class D/C felony as charged in Count \_\_\_\_\_.

**Comments**

The term "synthetic identifying information" is defined by law. See I.C. 35-43-5-1; Instruction No. 14.201.5.

I.C. 35-43-5-3.8(c) provides:

The conduct prohibited in subsection (a) does not apply to:

1. a person less than twenty-one (21) years of age who uses the synthetic identifying information of another person to acquire an alcoholic beverage (as defined in IC 7.1-1-3-5);
2. a minor (as defined in IC 35-49-1-4) who uses the synthetic identifying information of another person to acquire:
  - (A) a cigarette or tobacco product (as defined in IC 6-7-2-5);
  - (B) a periodical, a videotape, or other communication medium that contains or depicts nudity (as defined in IC 35-49-1-5);
  - (C) admittance to a performance (live or film) that prohibits the attendance of the minor based on age; or
  - (D) an item that is prohibited by law for use or consumption by a minor.

The Committee believes that this “does not apply” provision was intended by the legislature to establish “exceptions” to criminal liability under this section. The burden to prove an exemption or exception to a crime has been held to be a defendant’s by a preponderance of the evidence. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001).

The statute’s subsection (d) provides that “[i]t is not a defense in a prosecution under subsection (a) or (b) that no person was harmed or defrauded.”



**Instruction No. 4.86.5. Possession of Card Skimming Device.****I.C. 35-43-5-4.3.**

The crime of possession of a card skimming device is defined by law as follows:

A person who possesses a card skimming device with intent to commit [(identity deception, IC 35-43-5-3.5) (synthetic identity deception, IC 35-43-5-3.8) (fraud, IC 35-43-5-4) commits possession of a card skimming device, a Class D felony] [terroristic deception (IC 35-43-5-3.6) commits possession of a card skimming device, a Class C felony].

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. possessed
3. a card skimming device
4. with the intent to commit

[(for Class D felony) identity deception, by (knowingly) (intentionally) (obtaining) (possessing) (transferring) (using) the identifying information of another person, including the identifying information of a person who is deceased, without the other person's consent and with intent to ({harm} {defraud} another person) (assume the identity of another person) (profess to be another person))]

[or]

[(for Class D felony) synthetic identity deception, by [knowingly] [intentionally] [obtaining] [possessing] [transferring] [using] synthetic identifying information with intent to ([harm] [defraud] another person) (assume the identity of another person) (profess to be another person))]

[or]

[(for Class D felony) fraud, by (*obtain elements of particular type of fraud alleged from Instruction Nos. 4.45(a) to 4.55(i)*)]

[or]

[(for Class C felony) terroristic deception, by (knowingly) (intentionally) (obtaining) (possessing) (transferring) (using) the identifying information of another person with intent to (commit terrorism) (obtain or transport a weapon of mass destruction).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a card skimming device, a Class D/C felony as charged in Count \_\_\_\_\_.

**Comments**

The terms "card skimming device," "identifying information," and "synthetic

identifying information" are defined by law. See I.C. 35-43-5-4.3 and I.C. 35-43-5-1; Instruction Nos. 14.15.1, 14.117.2, and 14.201.5.



**Instruction No. 4.91.1. Children's Health Insurance Program Fraud.\*****I.C. 35-43-5-7.2(a)(1).**

The crime of children's health insurance fraud is defined by law as follows:

A person who [knowingly] [intentionally] files a children's health insurance program claim, including an electronic claim, in violation of I.C. 12-17.6 commits children's health insurance fraud, a class D felony. [The offense is a class C felony if the fair market value of the offense is at least one hundred thousand dollars (\$100,000).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. filed a children's health insurance program claim
4. and the claim was in violation of I.C. 12-17.6 in that (*specify violation alleged*)
- [5. and the fair market value of the offense was at least one hundred thousand dollars (\$100,000)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of children's health insurance program fraud, a class D/C felony, as charged in Count \_\_\_\_\_.

(Text continued on page 4-199)





**Instruction No. 4.91.2. Children's Health Insurance Program Fraud.**

I.C. 35-43-5-7.2(a)(2).

The crime of children's health insurance fraud is defined by law as follows:

A person who [knowingly] [intentionally] obtains payments from the children's health insurance program under I.C. 12-17.6 by means of a (false) (misleading) (oral) (written) statement] [fraudulent means] commits children's health insurance fraud \*, a class D felony. [The offense is a class C felony if the fair market value of the offense is at least one hundred thousand dollars (\$100,000).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. obtained payments from the children's health insurance program under I.C. 12-17.6
4. [by means of the following (written) (oral) statement (*describe statement*) which was a (false) (misleading) statement in that (*describe allegations*)]  
[or]  
[by the following fraudulent means (*describe allegations*)]
- [5. and the fair market value of the offense was at least one hundred thousand dollars (\$100,000)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of children's health insurance program fraud, a class D/C felony, as charged in Count \_\_\_\_\_.

**Instruction No. 4.91.3 Children's Health Insurance Program Fraud.**

I.C. 35-43-5-7.2(a)(3).

The crime of children's health insurance fraud is defined by law as follows:

A person who [knowingly] [intentionally] acquires a provider number under the children's health insurance program except as provided by law commits children's health insurance fraud \*, a class D felony. [The offense is a class C felony if the fair market value of the offense is at least one hundred thousand dollars (\$100,000).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. acquired a provider number under the children's health insurance program
4. illegally
5. by *(describe alleged way in which number acquired)*
- [6. and the fair market value of the offense was at least one hundred thousand dollars (\$100,000)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of children's health insurance program fraud, a class D/C felony, as charged in Count \_\_\_\_\_.



**Instruction No. 4.91.4. Children's Health Insurance Program Fraud.**

I.C. 35-43-5-7.2(a)(4).

The crime of children's health insurance fraud is defined by law as follows:

A person who [knowingly] [intentionally] alters with intent to defraud or falsifies documents or records of a provider (as defined in 42 CFR 1002.301) that are required to be kept under the children's health insurance program commits children's health insurance fraud \*, a class D felony. [The offense is a class C felony if the fair market value of the offense is at least one hundred thousand dollars (\$100,000).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [altered with intent to defraud]  
[or]  
[falsified]
4. (*describe alleged documents or records falsified*)
5. which were documents or records of (*name individual or entity*), an (individual) (entity) furnishing Medicaid services under a provider agreement with (*name agency*), a Medicaid agency.
- [6. and the fair market value of the offense was at least one hundred thousand dollars (\$100,000)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of children's health insurance program fraud, a class D/C felony, as charged in Count \_\_\_\_\_.

**Comments**

42 CFR Parts 1000 through 1007 were amended beginning at 57 FR 3298 and at 63 FR 46676, and the Medicaid regulatory definition of "provider", referred to in IC 35-43-5-7.23(a)(4), as used in 42 CFR Chapter V, is now found in 42 CFR Part 1000, § 1000.30, which provides as of November 2003 as follows:

Provider means any individual or entity furnishing Medicaid services under a provider agreement with the Medicaid agency.



**Instruction No. 4.91.5. Children's Health Insurance Program Fraud.**

I.C. 35-43-5-7.2(a)(5).

The crime of children's health insurance fraud is defined by law as follows:

A person who [knowingly] [intentionally] conceals information for the purpose of (applying for) (receiving) unauthorized payments from the children's health insurance program commits children's health insurance fraud \*, a class D felony. [The offense is a class C felony if the fair market value of the offense is at least one hundred thousand dollars (\$100,000).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. concealed (*describe alleged information concealed*)
4. for the purpose of (applying for) (receiving)

unauthorized payments from the children's health insurance program

- [5. and the fair market value of the offense was at least one hundred thousand dollars (\$100,000)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of children's health insurance program fraud, a class D/C felony, as charged in Count \_\_\_\_\_.

**Instruction No. 4.95(a). Insurance Fraud — 12-17.6 Violation.**

I.C. 35-43-5-7.3(a)(1).

This instruction is withdrawn. The statute has been repealed.



**Instruction No. 4.95(b). Insurance Fraud — False Statement.**

I.C. 35-43-5-7.3(a)(2).

This instruction is withdrawn. The statute has been repealed.

**Instruction No. 4.95(c). Insurance Fraud — Illegal Provider Number.**

I.C. 35-43-5-7.3(a)(3).

This instruction is withdrawn. The statute has been repealed.



**Instruction No. 4.95(d). Insurance Fraud — Altered Documents.**

I.C. 35-43-5-7.3(a)(4).

This instruction is withdrawn. The statute has been repealed.

**Instruction No. 4.95(e). Insurance Fraud — Concealed Information.**

I.C. 35-43-5-7.3(a)(5).

This instruction is withdrawn. The statute has been repealed.

*(Text continued on page 4-209)*



**Instruction No. 4.97. Possession of a Fraudulent Sales Document.****I.C. 35-43-5-14.**

The crime of possession of a fraudulent sales document is defined by law as follows:

A person who with intent to defraud possesses [a retail sales receipt] [a (label) (other item) with a universal product code (UPC)] [a (label) (other item) that contains a product identification code that applies to an item other than the items to which the (label) (other item) applies ] commits possession of a fraudulent sales document, a Class A misdemeanor. [The offense is a class D felony if the person possesses at least fifteen (15): (retail sales receipts) (labels containing a universal product code (UPC)) (labels containing another product identification code) (any combination of the items described above).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. possessed
  - [a retail sales receipt]
  - [or]
  - [(for D felony only) at least fifteen (15) retail sales receipts]
  - [or]
  - [a (label) (other item) with a universal product code (UPC)]
  - [or]
  - [(for D felony only) at least fifteen (15) (labels) (other items) with a universal product code (UPC)]
  - [or]
  - [a (label) (other item) that contained a product identification code that applied to an item]
  - [or]
  - [(for D felony only) at least fifteen (15) (labels) (other items) that contained a product identification code that applied to an item]
3. with the intent to defraud (*name*)

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a fraudulent sales document, a Class A misdemeanor/D felony, as charged in Count \_\_\_\_\_.

**Instruction No. 4.99. Possession of a Fraudulent Sales Document Manufacturing Device.****I.C. 35-43-5-15.**

The crime of possession of a fraudulent sales document manufacturing device is defined by law as follows:

A person who, with intent to defraud, possesses a device to make [retail sales receipts] [universal product codes (UPC)] [other product identification codes] commits possession of a fraudulent sales document manufacturing device, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. possessed a device to make  
[retail sales receipts]  
[or]  
[universal product codes (UPC)]  
[or]  
[product identification codes]
3. with the intent to defraud (*name*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a fraudulent sales document manufacturing device, a Class A misdemeanor, as charged in Count \_\_\_\_\_.



**Instruction No. 4.101. Making a False Sales Document.****I.C. 35-43-5-16.**

The crime of making a false sales document is defined by law as follows:

A person who, with intent to defraud, [makes a false (universal product code (UPC) (another product identification number)) [puts a false (universal product code (UPC)) (another product identification number)] on property (displayed) (offered) for sale] [makes a false sales receipt] commits making a false sales document, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [made a false (universal product code (UPC)) (another product identification number)]  
[or]  
[put a false (universal product code (UPC)) (another product identification number) on property (displayed) (offered) for sale]  
[or]  
[made a false sales receipt]
3. with the intent to defraud (*name*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of making a false sales document, a Class D felony, as charged in Count \_\_\_\_\_.

**Instruction No. 4.103. Delivery of a False Sales Document.****I.C. 35-43-5-17.**

The crime of delivery of a false sales document is defined by law as follows: a person who, with intent to defraud, delivers a [false sales receipt] [duplicate of a sales receipt] [(label) (other item) with a false (universal product code (UPC)) (other product identification code)] to another person commits delivery of a false sales document, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. delivered to (*name*)
3. [a false sales receipt]  
[a duplicate of a sales receipt]  
[(a label) (another item) with a false (universal product code (UPC)) (other product identification code)]
4. with the intent to defraud (*name*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of delivery of a false sales document, a Class D felony, as charged in Count \_\_\_\_\_.



## **CHAPTER 5**

# **OFFENSES AGAINST PUBLIC ADMINISTRATION (effective for crimes committed June 30, 2014 or before)**

### **SYNOPSIS**

- Instruction No. 5.01A. Bribery (Person Bribing Public Servant).**
- Instruction No. 5.01B. Bribery (Public Servant Taking Bribe).**
- Instruction No. 5.01C. Bribery (Bribe to Third Person to Control a Public Servant).**
- Instruction No. 5.01D. Bribery (Person With Intent to Control Public Servant).**
- Instruction No. 5.03A. Bribery (Bribing Participant in Athletic Contest).**
- Instruction No. 5.03B. Bribery (Participant in Athletic Contest Taking Bribe).**
- Instruction No. 5.05A. Bribery (Witness or Informant Taking Bribe).**
- Instruction No. 5.05B. Bribery (Bribing a Witness or Informant).**
- Instruction No. 5.06. Official Misconduct.**
- Instruction No. 5.07. Conflict of Interest.**
- Instruction No. 5.09. Sexual Misconduct by Service Provider.**
- Instruction No. 5.11. Perjury.**
- Instruction No. 5.13. False Reporting.**
- Instruction No. 5.15A. Impersonating a Public Servant.**
- Instruction No. 5.15B. Impersonating a Police Officer or State Revenue Department Employee.**
- Instruction No. 5.17A. Ghost Employment (Employer Who Hired and Assigned No Duties).**
- Instruction No. 5.17B. Ghost Employment (Employer Who Assigned Nongovernmental Duties).**
- Instruction No. 5.19. Ghost Employment (Employee With No Duties).**
- Instruction No. 5.19B. Ghost Employment (Employee With Nongovernmental Duties).**
- Instruction No. 5.21. Assisting a Criminal.**
- Instruction No. 5.22. Disarming a Law Enforcement Officer.**
- Instruction No. 5.23. Resisting Law Enforcement (Use of Force).**
- Instruction No. 5.25. Resisting Law Enforcement (Fleeing).**
- Instruction No. 5.26. Resisting Law Enforcement (Fleeing in Vehicle Defined).**
- Instruction No. 5.27. Obstruction of Justice (Coercion).**
- Instruction No. 5.29. Obstruction of Justice (Avoiding or Disobeying Process).**

- Instruction No. 5.31. Obstruction of Justice (Destroying Evidence).  
Instruction No. 5.33. Obstruction of Justice (Falsifying Evidence).  
Instruction No. 5.35. Obstruction of Justice (Influencing Juror).  
Instruction No. 5.37A. Escape—Flight.  
Instruction No. 5.37B. Escape—Home Detention.  
Instruction No. 5.37C. Escape—Failure to Return.  
Instruction No. 5.39. Failure to Appear.  
Instruction No. 5.41. Trafficking with an Inmate.  
Instruction No. 5.42. Trafficking with an Inmate Outside a Facility.  
Instruction No. 5.42.5. Possessing Deadly Weapon in Penal or Juvenile Facility.  
Instruction No. 5.43. Possession of Dangerous Material by Incarcerated Person.  
Instruction No. 5.45. Impersonating a Firefighter.  
Instruction No. 5.47.1. Failure of Offender to Register—Living in Indiana.  
Instruction No. 5.47.2. Failure of Offender to Register—Property in Indiana.  
Instruction No. 5.47.3. Failure of Offender to Register—Work in Indiana.  
Instruction No. 5.47.4. Failure of Offender to Register—School in Indiana.  
Instruction No. 5.47.5. Registration Misstatement or Omission.  
Instruction No. 5.47.6. Failure to Register In Person.  
Instruction No. 5.47.7. Failure to Reside at Registered Address or Location.  
Instruction No. 5.49. Lifetime Parole Violation—Contact with Child or Victim.  
Instruction No. 5.51. Failure of an Offender to Possess Identification.  
Instruction No. 5.53. False Verification of Citizenship or Immigration Status.  
Instruction No. 5.55. Transporting an Illegal Alien.  
Instruction No. 5.57. Harboring an Illegal Alien.

*(Text continued on page 5-3)*



**Instruction No. 5.01A. Bribery (Person Bribing Public Servant).****I.C. 35-44-1-1(1).**

The crime of bribery is defined by statute as follows:

A person who confers, offers, or agrees to confer on a public servant, either before or after the public servant becomes appointed, elected, or qualified, any property except property the public servant is authorized by law to accept, with intent to control the performance of an act related to the employment or function of the public servant, commits bribery a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. conferred, offered or agreed to confer
3. on (*name*), a public servant, either before or after (*name*) became appointed, elected, or qualified
4. any property except property (*name*) was authorized by law to accept
5. with intent to control the performance of an act related to the employment or function of (*name*).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of bribery, a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "property" and "public servant" are defined by law. See I.C. 35-41-1-23 and I.C. 35-41-1-24; Instruction Nos. 14.165 and 14.169.

**Instruction No. 5.01B. Bribery (Public Servant Taking Bribe).****I.C. 35-44-1-1(2).**

The crime of bribery is defined by statute as follows:

A person who, being a public servant, solicits, accepts, or agrees to accept, either before or after he becomes appointed, elected, or qualified, any property, except property he is authorized by law to accept, with intent to control the performance of an act related to his employment or function as a public servant commits bribery, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. when a public servant, as defined in these instructions,
3. solicited, accepted, or agreed to accept, either before or after the Defendant was appointed, elected or qualified as a public servant
4. any property, except property he or she was authorized by law to accept
5. with intent to control the performance of an act related to Defendant's employment or function as a public servant.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of bribery, a Class C felony, charged in Count \_\_\_\_\_.

*(Text continued on page 5-5)*



**Comments**

The terms "property" and "public servant" are defined by law. See I.C. 35-41-1-23 and I.C. 35-41-1-24; Instruction Nos. 14.165 and 14.169.

**Instruction No. 5.01C. Bribery (Bribe to Third Person to Control a Public Servant).**

**I.C. 35-44-1-1(3).**

The crime of bribery is defined by statute as follows:

A person who confers, offers, or agrees to confer on a person any property, except property the person is authorized by law to accept, with intent to cause that person to control the performance of an act related to the employment or function of a public servant commits bribery, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. conferred, offered or agreed to confer
3. on (*name*)
4. any property, except property (*name*) was authorized by law to accept
5. with intent to cause (*name*) to control the performance of an act related to the performance or function of (*name public servant*), a public servant.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of bribery, a Class C felony, charged in Count \_\_\_\_\_.



**Comments**

The terms "property" and "public servant" are defined by law. See I.C. 35-41-1-23 and I.C. 35-41-1-24; Instruction Nos. 14.165 and 14.169.

**Instruction No. 5.01D. Bribery (Person With Intent to Control Public Servant).**

**I.C. 35-44-1-1(4).**

The crime of bribery is defined by statute as follows:

A person who solicits, accepts, or agrees to accept any property, except property he is authorized by law to accept, with intent to control the performance of an act related to the employment or function of a public servant; commits bribery, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. solicited, accepted or agreed to accept
3. any property, except property he was authorized by law to accept
4. with intent to control the performance of an act related to the employment or function of a public servant.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of bribery, a Class C felony, charged in Count \_\_\_\_\_.



**Comments**

The terms "property" and "public servant" are defined by law. See I.C. 35-41-1-23 and I.C. 35-41-1-24; Instruction Nos. 14.165 and 14.169.

**Instruction No. 5.03A. Bribery (Bribing Participant in Athletic Contest).****I.C. 35-44-1-1(5).**

The crime of bribery is defined by statute as follows:

A person who confers, offers, or agrees to confer any property on a person participating or officiating in, or connected with, an athletic contest, sporting event, or exhibition, with intent that the person will fail to use his best efforts in connection with that contest, event, or exhibition commits bribery, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. conferred, offered or agreed to confer property
3. on (*name*), who was a person (participating in) (officiating in) (connected with) an athletic contest, sporting event or exhibition
4. with intent that (*name*) would fail to use his or her best efforts in connection with the contest, event or exhibition.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of bribery, a Class C felony, charged in Count \_\_\_\_\_.



**Comments**

The term "property" is defined by law. See I.C. 35-41-1-23: Instruction No. 14.165.

**Instruction No. 5.03B. Bribery (Participant in Athletic Contest Taking Bribe).**

**35-44-1-1(6).**

The crime of bribery is defined by statute as follows:

A person who, being a person participating or officiating in, or connected with an athletic contest, sporting event, or exhibition, solicits, accepts, or agrees to accept any property with intent that he will fail to use his best efforts in connection with that contest, event, or exhibition, commits bribery, a Class C felony).

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. (while participating) (officiating) (was connected with) an athletic contest, sporting event or exhibition, and
3. solicited, accepted, or agreed to accept any property
4. with intent that Defendant would fail to use his or her best efforts in connection with the contest, event or exhibition.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of bribery, a Class C felony, charged in Count \_\_\_\_\_.



**Comments**

The term "property" is defined by law. See I.C. 35-41-1-23; Instruction No. 14.165.

**Instruction No. 5.05A. Bribery (Witness or Informant Taking Bribe).****I.C. 35-44-1-1(7).**

The crime of bribery is defined by statute as follows:

A person who, being a witness or informant in an official proceeding or investigation, solicits, accepts, or agrees to accept any property [with intent to withhold any testimony, information, document, or thing] [to avoid legal process summoning him to testify or supply evidence] [to absent himself from the proceeding or investigation to which he has been legally summoned] commits bribery, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. being a witness or informant in an official proceeding or investigation
3. solicited, accepted or agreed to accept any property
4. [with intent to withhold any testimony, information, document, or thing]  
[with intent to avoid legal process summoning him to testify or supply evidence]  
[with intent to absent himself from the proceeding or investigation to which he had been legally summoned]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of bribery, a Class C felony, charged in Count \_\_\_\_\_.



**Comments**

The term "property" is defined by law. See I.C. 35-41-1-23; Instruction No. 14.165.

**Instruction No. 5.05B. Bribery (Bribing a Witness or Informant).****I.C. 35-44-1-1(8).**

The crime of bribery is defined by statute as follows:

A person who confers, offers or agrees to confer any property on a witness or informant in an official proceeding or investigation, with intent that the witness or informant [withhold any testimony, information, document, or thing] [avoid legal process summoning the witness or informant to testify or supply evidence] [absent himself/herself from any proceeding or investigation to which the witness or informant has been legally summoned] commits bribery, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. [conferred] [offered,] [or agreed to confer] property on (name), a witness or informant, in an official proceeding or investigation
3. when Defendant intended that [name]:  
[withhold any testimony, information, document or thing]  
[or]  
[avoid legal process summoning him/her to testify or supply evidence]  
[or]  
[absent himself/herself from any proceeding or investigation to which he had been legally summoned.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of bribery, a Class C felony, charged in Count \_\_\_\_\_.



**Comments**

The term "property" is defined by law. *See* I.C. 35-41-1-23; Instruction No. 14.165.

## Instruction No. 5.06. Official Misconduct.

## I.C. 35-44-1-2:

The crime of official misconduct is defined by statute as follows:

A public servant who knowingly or intentionally [commits an offense in the performance of the public servant's official duties] [solicits, accepts, or agrees to accept from an appointee or employee any property other than what the public servant is authorized by law to accept as a condition of continued employment] [acquires or divests himself or herself of a pecuniary interest in any property, transaction, or enterprise or aids another person to do so based on information obtained by virtue of the public servant's office that official action that has not been made public is contemplated] [fails to deliver public records and property in the public servant's custody to the public servant's successor in office when that successor qualifies] commits official misconduct, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. while a public servant
3. knowingly or intentionally
4. [committed the crime of insert name of offense] while in the performance of Defendant's official duties as a public servant]

[or]

[(solicited) (accepted) (agreed to accept) from (name), a public (appointee) (employee), as a condition of continued employment, (describe alleged property), which was property the Defendant was not authorized by law to accept as a public servant]

[or]

[(acquired) (divested {himself} {herself}) (aided {name alleged other person} in {acquiring} {divesting} {himself} {herself}) of (describe alleged interest), which was a pecuniary interest in (property) (a transaction) (an enterprise) based on information, which defendant obtained by virtue of (his) (her) public office, that (describe alleged official action), which was official action that was contemplated but had not been made public]

[or]

[failed to deliver (describe alleged public records and/or property, which (were) (was) (public records) (property) in Defendant's custody, to (name alleged successor), who was Defendant's successor in office, when (name alleged successor) had qualified for the office).

If the State failed to prove each of these elements beyond a reasonable doubt, you



must find the Defendant not guilty of official misconduct, a Class D felony.

**Comment**

The terms "divest," "pecuniary," and "solicit" are defined for optional use with this instruction. See Instruction Nos. 14.69.7; 14.147.5, and 14.191.7.

**Instruction No. 5.07. Conflict of Interest.****I.C. 35-44-1-3.**

The crime of conflict of interest is defined by statute as follows:

A public servant who knowingly or intentionally [has a pecuniary interest in] [derives a profit from] a contract or purchase connected with an action by the governmental entity served by the public servant, commits conflict of interest, a Class D felony.

Before you may convict the Defendant, the State must prove the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [had a pecuniary interest in]  
[or]  
[derived a profit from]  
[or]  
[derived a profit from]
4. a contract or purchase connected with an action by the governmental entity the Defendant served.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of conflict of interest, a Class D felony, charged in Count \_\_\_\_\_.

*(Text continued on page 5-19)*



**Comments**

Numerous qualifications on liability are contained in this statute. The Committee takes no position as to whether these are exceptions, elements, or defenses.

The terms "public servant" and "governmental entity" are defined by law. See I.C. 35-41-1-12 and I.C. 35-41-1-24; Instruction Nos. 14.99 and 14.169.

**Instruction No. 5.09. Sexual Misconduct by Service Provider.****I.C. 35-44-1-5.**

The crime of sexual misconduct by a service provider is defined by statute as follows:

A service provider who knowingly or intentionally engages in sexual intercourse or deviate sexual conduct with a person who is subject to lawful detention commits sexual misconduct, a Class D felony.

Before you may convict the Defendant, the State must prove the following beyond a reasonable doubt:

1. The Defendant
2. while in the capacity of service provider
3. knowingly or intentionally
4. engaged in [sexual intercourse] [deviate sexual conduct] with (*name*)
5. when [*name*] was subject to lawful detention.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of sexual misconduct, a Class D felony, charged in Count \_\_\_\_\_.



**Comments**

The terms "deviate sexual conduct," "lawful detention," "sexual intercourse" and "service provider" are defined by law. See I.C. 35-41-1-9, I.C. 35-41-1-18, I.C. 35-41-1-26 and I.C. 35-44-1-5; Instruction Nos. 14.57, 14.125, 14.187 and 14.189.

**Instruction No. 5.11. Perjury.****I.C. 35-44-2-1.**

The crime of perjury is defined by statute as follows:

A person who [makes a false, material statement under oath or affirmation knowing the statement to be false or not believing it to be true] [has knowingly made two (2) or more material statements in a proceeding before a court or grand jury, which are inconsistent to the degree that one (1) of them is necessarily false] commits perjury, a Class D felony.

Before you may convict the Defendant, the State must prove the following beyond a reasonable doubt:

1. The Defendant
  2. made a false, material statement
  3. under oath or affirmation
  4. [when the Defendant knew the statement was false] [when the Defendant did not believe the statement was true]
- [or]
1. The Defendant
  2. knowingly made two (2) or more material statements
  3. in a proceeding before a {court} {grand jury}
  4. which were so inconsistent that one (1) of the statements was necessarily false.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of perjury, a Class D felony, charged in Count \_\_\_\_\_.



**Instruction No. 5.13. False Reporting.****I.C. 35-44-2-2(a).**

The crime of false reporting is defined by statute as follows:

A person who reports by telephone, telegraph, mail, or other written or oral communication, [that Defendant or another person (has placed) (intends to place) an explosive, a destructive device, or other destructive substance in a building or transportation facility] [that there has been or there will be tampering with a consumer product introduced into commerce] knowing the report to be false, commits false reporting, a Class D felony.

Before you may convict the Defendant, the State must prove the following beyond a reasonable doubt:

1. The Defendant
2. communicated by [telephone] [telegraph] [mail] [other written or oral communication]
3. [that Defendant or another person had placed or intended to place an explosive or destructive substance in a building or transportation facility]  
[that there had been or would be tampering with a consumer product introduced into commerce]
4. when the Defendant knew the report was false.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of false reporting, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term "consumer product" is defined by law. See Instruction No. 14.29; I.C. 35-45-8-1, I.C. 16-1-28-3.



**Instruction No. 5.15A. Impersonating a Public Servant.****I.C. 35-44-2-3.**

The crime of impersonating a public servant is defined by statute as follows:

A person who falsely represents that the person is a public servant, with intent to mislead and induce another person to submit to false official authority or otherwise to act to the other person's detriment in reliance on the false representation, commits impersonation of a public servant, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
  2. falsely represented [himself] [herself]
  3. to be a public servant, (*here specify alleged representation*),
  4. with the intent to mislead and induce (*name subject of misrepresentation*)
  5. [to submit to false official authority]
- [or]

[to act to (*name subject of misrepresentation*)'s detriment in reliance on the false representation].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of impersonating a public servant, a Class A misdemeanor, charged in Count \_\_\_\_\_.

**Comments**

The term "public servant" is defined by law. See I.C. 35-41-1-24; Instruction No. 14.169.



**Instruction No. 5.15B. Impersonating a Police Officer or State Revenue Department Employee.**

**I.C. 35-44-2-3.**

The crime of impersonating [a police officer] [a revenue service employee] is defined by statute as follows:

A person who falsely represents that the person is [a law enforcement officer] [an agent or employee of the department of state revenue, and collects any property from another person] commits impersonation of [a law enforcement officer] [a state revenue department employee], a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. falsely represented to [*name person alleged*]
3. that Defendant was
4. [a law enforcement officer]

[or]

[an agent or employee of the Indiana Department of State Revenue and Defendant collected property, [*specify property alleged*], from (*name subject of misrepresentation*)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of impersonating [a law enforcement officer] [a state revenue department employee], a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "law enforcement officer" and "property" are defined by law. See I.C. 35-41-1-17(a) and I.C. 35-41-1-23; Nos. 14.123 and 14.165.



**Instruction No. 5.17A. Ghost Employment (Employer Who Hired and Assigned No Duties).****I.C. 35-44-2-4(a).**

The crime of ghost employment is defined by statute as follows:

A public servant who knowingly or intentionally hires an employee for the governmental entity that he/she serves and [fails to assign to the employee any duties] [assigns to the employee any duties not related to the operation of the governmental entity] commits ghost employment, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. while a public servant
3. knowingly or intentionally
4. hired (*name*) as an employee for (*name governmental entity*), a governmental entity that the Defendant served, and
5. (failed to assign (*name*) any duties) (or) (assigned (*name*) duties not related to the operation of the governmental entity).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of ghost employment, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "public servant" and "governmental entity" are defined by law. See I.C. 35-41-1-12 and I.C. 35-41-1-24; Instruction Nos. 14.99 and 14.169.



**Instruction No. 5.17B. Ghost Employment (Employer Who Assigned Nongovernmental Duties).****I.C. 35-44-2-4(b).**

The crime of ghost employment is defined by statute as follows:

A public servant who knowingly or intentionally assigns to an employee under his supervision any duties not related to the operation of the governmental entity that Defendant serves commits ghost employment, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. while a public servant
3. knowingly or intentionally
4. assigned (*name*), an employee under Defendant's supervision, duties not related to the operations of the governmental unit that Defendant served.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of ghost employment, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term "public servant" is defined by law. See I.C. 35-41-1-12; Instruction No. 14.99.



**Instruction No. 5.19. Ghost Employment (Employee With No Duties).**

**I.C. 35-44-2-4(c).**

The crime of ghost employment is defined by statute as follows:

A person employed by a governmental entity, who knowing that Defendant has not been assigned any duties to perform for the entity, accepts property from the entity, commits ghost employment, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. while employed by (name), a governmental entity,
3. accepted property from (name)]
4. when Defendant knew he/she had not been assigned any duties to perform for (name).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of ghost employment, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "governmental entity" and "property" are defined by law. See I.C. 35-41-1-12 and I.C. 35-41-1-24; Instruction Nos. 14.99 and 14.165.



**Instruction No. 5.19B. Ghost Employment (Employee With Nongovernmental Duties).**

**I.C. 35-44-2-4(d)**

The crime of ghost employment is defined by statute as follows:

A person employed by a governmental entity who knowingly or intentionally accepts property from the entity for the performance of duties not related to the operation of the entity, commits ghost employment, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. while employed by (name), a governmental entity
3. knowingly or intentionally
4. accepted property, (*specify alleged property*) from (name)
5. for the performance of duties not related to the operation of (name).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of ghost employment, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "governmental entity" and "property" are defined by law. See I.C. 35-41-1-12 and I.C. 35-41-1-24; Instruction Nos. 14.99 and 14.165.



**Instruction No. 5.21. Assisting a Criminal.****I.C. 35-44-3-2.**

The crime of assisting a criminal is defined by statute as follows:

A person not standing in the relation of parent, child, or spouse to another person when the other person [has committed a crime] [is a fugitive from justice], who with intent to hinder the apprehension or punishment of the other person, harbors, conceals, or otherwise assists the other person commits assisting a criminal, a Class A misdemeanor. The offense is a Class D felony if the person assisted has committed a Class B, Class C or Class D felony, and a Class C felony if the person assisted has committed murder or a Class A felony, or if the assistance was providing a deadly weapon.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. who was not the parent, child or spouse of (*name of person assisted*)
3. harbored, concealed or assisted (*name*)
4. with the intent to hinder the apprehension or punishment of (*name*)
5. [after (*name*) had committed the crime of (*specify crime alleged*) by (*set out elements of crime alleged*)]  
[or]  
[when (*name*) was a fugitive from justice]
- [6. and the crime (*name*) committed was a Class [B] [C] [D] felony]
- [7. (and the crime (*name*) committed was a Class [A] felony)  
(or)  
(and the assistance Defendant gave (*name*) was providing a deadly weapon)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of assisting a criminal, a Class A misdemeanor/ Class D/C felony, charged in Count \_\_\_\_\_.

**Comments**

The term “deadly weapon” is defined by law. See I.C. 35-41-1-8; Instruction No. 14.49.

The term “fugitive from justice” is not defined by statute. For a case suggesting the General Assembly intended “fugitive from justice” to have the meaning used in the law of extradition, see *Frost v. State*, 527 N.E.2d 228 (Ind. Ct. App. 1988).

The language below was added to the assisting a criminal statute applicable to crimes committed on or after July 1, 2009:

- b) It is not a defense to a prosecution under this section that the person assisted:

- (1) has not been prosecuted for the offense;
- (2) has not been convicted of the offense; or
- (3) has been acquitted of the offense by reason of insanity.

However, the acquittal of the person assisted for other reasons may be a defense.



**Instruction No. 5.22. Disarming a Law Enforcement Officer.****I.C. 35-42-4-12.**

The crime of disarming a law enforcement officer is defined by law as follows:

A person who knows that another person is an officer, and knowingly or intentionally [takes] [attempts to take] [a firearm] [a weapon] that the officer is authorized to carry from the officer or from the immediate proximity of the officer, without the consent of the officer and while the officer is engaged in the performance of his or her official duties, commits disarming a law enforcement officer, a Class C felony. [The offense is a Class B felony if it results in serious bodily injury to the officer.] [The offense is a Class A felony if (it results in death to the officer) (a firearm was taken and the offense results in serious bodily injury to the officer)].

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knew that (*name officer*) was an officer, and
3. knowingly or intentionally
4. [took] [attempted to take]
5. from [*name officer*] [the immediate proximity of (*name officer*)]
6. [a firearm] [a weapon] which (*name officer*) was authorized to carry
7. without the consent of [*name officer*]
8. while [*name officer*] was engaged in the performance of [his] [her] official duties
- [9. and Defendant's conduct resulted in serious bodily injury to (*name officer*)]
- [10. and  
(Defendant's conduct resulted in the death of {*name officer*})  
(or)  
(a firearm was taken and Defendant's conduct resulted in serious bodily injury to {*name officer*})].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of disarming a law enforcement officer, a Class C/B/A felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "firearm," "officer," and "serious bodily injury" are defined by law. See I.C. 35-47-1-5, I.C. 35-44-3-3.5, and I.C. 35-41-1-25; Instruction Nos. 14.87, 14.141.5, and 14.185.

**Instruction No. 5.23. Resisting Law Enforcement (Use of Force).****I.C. 35-44-3-3(a)(1), (2).**

The crime of resisting law enforcement is defined by statute as follows:

A person who knowingly or intentionally forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties as an officer, or forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court commits resisting law enforcement, a Class A misdemeanor. [The offense is a Class D felony if, while committing it, the person (draws or uses a deadly weapon) (inflicts bodily injury on another person) (operates a vehicle in a manner that creates a substantial risk of bodily injury to another person).] [The offense is a Class C felony if the person operates a vehicle in a manner that causes serious bodily injury to another person.]

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. forcibly
4. [resisted, obstructed or interfered with ([name], a law enforcement officer) ([name], a person assisting [name], a law enforcement officer) while the officer was lawfully engaged in the execution of his duties as an officer)]

[or]

[resisted, obstructed or interfered with the authorized service or execution of a civil or criminal process or order of a court]

- [5. (for Class D felony) and, while committing the offense, Defendant (drew or used a deadly weapon)

(or)

(inflicted bodily injury on [name person injured])

(or)

(operated a vehicle in a manner that created a

substantial risk of bodily injury to another person))]

- [6. (for Class C felony) and, while committing the offense, Defendant operated a vehicle in a manner that caused serious bodily injury to (name), another person].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of resisting law enforcement, a Class A



misdemeanor/ Class D/C felony, charged in Count \_\_\_\_\_.

### Comments

The terms “bodily injury,” “deadly weapon,” and “serious bodily injury” are defined by law. *See* I.C. 35-41-1-4, I.C. 35-41-1-8, and I.C. 35-41-1-25; Instruction Nos. 14.13, 14.49, and 14.185.

The term “law enforcement officer” is also defined by law in I.C. 35-41-1-17 and Instruction No. 14.123, but the term and the instruction must be expanded for purposes of this offense to include “alcoholic beverage enforcement officer” and “conservation officer of the department of natural resources.” I.C. 35-44-3-3(c).

It has been held that, despite the “while the officer is lawfully engaged in the execution of his duties” language, the statute does not authorize a person to resist a peaceful arrest by one the person knows or has reason to know is a police officer performing his duties, regardless of whether the arrest is lawful or unlawful. *Dora v. State*, 783 N.E.2d 322 (Ind. Ct. App. 2003), *transfer denied*, 792 N.E.2d 41 (Ind. 2003). But there are exceptions to this general rule, as when the officer has made an illegal entry into a residence to effect an arrest, or when an officer is using unconstitutionally excessive force. *See Shoultz v. State*, 735 N.E.2d 818, 823 (Ind. Ct. App. 2000).

**Instruction No. 5.25. Resisting Law Enforcement (Fleeing).****I.C. 35-44-3-3(a)(3).**

The crime of resisting law enforcement is defined by statute as follows:

A person who knowingly or intentionally flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop commits resisting law enforcement, a Class A misdemeanor. [The offense is a Class D felony if (the person uses a vehicle to commit it) (while committing it, the person draws or uses a deadly weapon) (while committing it, the person inflicts bodily injury on another person) (while committing it, the person operates a vehicle in a manner that creates a substantial risk of bodily injury to another person).] [The offense is a Class C felony if, while committing it, the person operates a vehicle in a manner that causes serious bodily injury to another person.] [The offense is a Class B felony if, while committing it, the person operates a vehicle in a manner that causes the death of another person.]

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. fled from     [name]    , a law enforcement officer
4. after     [name]     had, by visible or audible means, identified himself and ordered the Defendant to stop
- [5. (for Class D felony) and Defendant:
  - (used a vehicle to commit the offense)
  - (drew or used a deadly weapon while committing the offense)
  - (inflicted bodily injury on     [name]     while committing the offense)
  - (operated a vehicle in a manner that created a substantial risk of bodily injury to     [name]     while committing the offense)]
- [6. (for Class C felony) and Defendant operated a vehicle in a manner that caused serious bodily injury to (name) while committing the offense]
- [7. (for Class B felony) and Defendant operated a vehicle in a manner that caused the death of (name) while committing the offense].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of resisting law enforcement, a Class A misdemeanor/ Class D/C/B felony, charged in Count \_\_\_\_\_.

**Comments**

The terms “bodily injury,” “deadly weapon,” and “serious bodily injury” are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-8, and I.C. 35-41-1-25; Instruction Nos. 14.13, 14.49, and 14.185.



The term “law enforcement officer” is also defined by law in I.C. 35-41-1-17 and Instruction No. 14.123, but the term and the instruction must be expanded for purposes of this offense to include “alcoholic beverage enforcement officer” and “conservation officer of the department of natural resources.” I.C. 35-44-3-3(c).

A person charged with resisting law enforcement by failing to stop the person’s vehicle promptly may request an instruction defining the term “flee” as excluding situations in which the person had a reasonable perception he or she should not stop immediately and should instead drive to a place of greater safety before stopping. *Cowans v. State*, 53 N.E.3d 540 (Ind. Ct. App. 2016). When there is evidence supporting the conclusion the defendant may have had adequate justification for not stopping at once and the defendant requests an instruction on this question, the Committee recommends using Instruction No. 5.26.

**Instruction No. 5.26. Resisting Law Enforcement (Fleeing in Vehicle Defined).**

A person who [knowingly or intentionally] fails to stop [his/her] vehicle in a prompt manner after a law enforcement officer has by visible or audible means identified [himself/herself] and ordered the person to stop, may be found to “flee” law enforcement when the person [knowingly or intentionally] attempts to escape from law enforcement or [knowingly or intentionally] attempts to unnecessarily prolong the time before the person must stop.

It is an issue in this case whether the Defendant [knowingly or intentionally] attempted to escape or unnecessarily prolong the time before stopping the vehicle.

The burden is on the State to prove beyond a reasonable doubt that the Defendant acted with the intent to escape from law enforcement.

If the State fails to prove that the Defendant acted with intent to escape beyond a reasonable doubt, you must find the Defendant not guilty of resisting law enforcement, a Level 6 felony.

**Comments**

The instruction defining fleeing in a vehicle should be given only if requested by the Defendant. It should not be given over the Defendant's objection.

*(Text continued on page 5-43)*



**Instruction No. 5.27. Obstruction of Justice (Coercion).****I.C. 35-44-3-4.**

The crime of obstruction of justice is defined by statute as follows:

A person who knowingly or intentionally induces, by threat, coercion, or false statement, a witness or informant in an official proceeding or investigation to [withhold or unreasonably delay in producing any testimony, information, document, or thing] [avoid legal process summoning him to testify or supply evidence] [absent himself from a proceeding or investigation to which Defendant has been legally summoned] commits obstruction of justice, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. induced by threat, coercion or false statement
4. [name], a witness or an informant in an official proceeding or investigation, to  
[withhold or unreasonably delay in producing any information, document or thing]  
[or]  
[avoid legal process summoning him to testify or supply evidence]  
[or]  
[absent himself from a proceeding or investigation to which Defendant had been legally summoned.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of obstruction of justice, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term "official proceeding" is defined by law. See I.C. 35-41-1-20; Instruction No. 14.143.



**Instruction No. 5.29. Obstruction of Justice (Avoiding or Disobeying Process).**

**I.C. 35-44-3-4.**

The crime of obstruction of justice is defined by statute as follows:

A person who knowingly or intentionally in an official criminal proceeding or investigation [withholds or unreasonably delays in producing any testimony, information, document, or thing after a court orders him to produce the testimony, information, document, or thing] [avoids legal process summoning him to testify or supply evidence] [absents himself from a proceeding or investigation to which Defendant has been legally summoned] commits obstruction of justice, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. in an official criminal proceeding or investigation

[withheld or unreasonably delayed in producing testimony, information, a document, or a thing after being ordered by a court to produce the testimony, information, document, or thing]

[or]

[avoided legal process summoning him to testify or supply evidence]

[or]

[absented himself from a proceeding or investigation to which Defendant had been legally summoned].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of obstruction of justice, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

A number of qualifications on liability are contained in subsection (b) of I.C. 35-44-3-4. The Committee takes no position as to whether these are exceptions, elements, or defenses.

There is no express statutory definition of "official criminal proceeding or investigation," but see the definition of "official proceeding" in I.C. 35-41-1-20 and Instruction No. 14.143.



**Instruction No. 5.31. Obstruction of Justice (Destroying Evidence).**

**I.C. 35-44-3-4.**

The crime of obstruction of justice is defined by statute as follows:

A person who alters, damages, or removes any record, document, or thing with intent to prevent it from being produced or used as evidence in any official proceeding or investigation commits obstruction of justice, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. altered, damaged, or removed
3. a record, document, or thing
4. with intent to prevent it from being produced or used as evidence in an official proceeding or investigation.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of obstruction of justice, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term "official proceeding" is defined by law. See I.C. 35-41-1-20; Instruction No. 14.143.



**Instruction No. 5.33. Obstruction of Justice (Falsifying Evidence).****I.C. 35-44-3-4.**

The crime of obstruction of justice is defined by statute as follows:

A person who makes, presents, or uses a false record, document, or thing, with intent that the record, document, or thing, material to the point in question, would appear in evidence in an official proceeding or investigation to mislead a public servant commits obstruction of justice, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. made, presented, or used
3. a false record, document, or thing
4. with intent that the record, document, or thing, which was material to the point in question, appear in evidence
5. in an official proceeding or investigation
6. for the purpose of misleading a public servant.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of obstruction of justice, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "official proceeding" and "public servant" are defined by law. See I.C. 35-41-1-20 and I.C. 35-41-1-24; Instruction Nos. 14.143 and 14.169.



**Instruction No. 5.35. Obstruction of Justice (Influencing Juror).****I.C. 35-44-3-4.**

The crime of obstruction of justice is defined by statute as follows:

A person who communicates, directly or indirectly, with a juror otherwise than as authorized by law, with intent to influence the juror regarding any matter that is or may be brought before the juror, commits obstruction of justice, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. communicated, directly or indirectly,
3. with a juror
4. otherwise than as authorized by law,
5. with intent to influence the juror regarding any matter which was or might have been brought before the juror.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of obstruction of justice, a Class D felony, charged in Count \_\_\_\_\_.

**Instruction No. 5.37A. Escape — Flight.**

**I.C. 35-44-3-5.**

The crime of escape is defined by statute as follows:

A person who intentionally flees from lawful detention commits escape, a Class C felony. [The offense is a Class B felony if, while committing it the person draws or uses a deadly weapon or inflicts bodily injury on another person.]

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. intentionally
3. fled from lawful detention
- [4. (for Class B felony) and while committing the offense the Defendant drew or used a deadly weapon.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of escape, a Class C/B felony, charged in Count \_\_\_\_\_.

**Comments**

The terms “bodily injury,” “deadly weapon” and “lawful detention” are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-8 and I.C. 35-41-1-18; Instruction Nos. 14.13, 14.49 and 14.125.



**Instruction No. 5.37B. Escape — Home Detention.****I.C. 35-44-3-5.**

The crime of escape is defined by statute as follows:

A person who knowingly or intentionally [violates a home detention] order or [intentionally removes an electronic monitoring device] commits escape, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following:

1. The defendant
2. knowingly or intentionally
3. [violated a home detention order]

[or]

[intentionally removed an electronic monitoring device].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of escape, a Class D felony, charged in Count \_\_\_\_\_.

**Instruction No. 5.37C. Escape — Failure to Return.**

**I.C. 35-44-3-5.**

The crime of escape is defined by statute as follows:

A person who knowingly or intentionally fails to return to lawful detention following temporary leave granted for a specified purpose or limited period commits failure to return to lawful detention, a Class D felony. [The offense is a Class C felony if, while committing it, the person draws or uses a deadly weapon or inflicts bodily injury on another person.]

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. failed to return to lawful detention following temporary leave granted for a specified purpose or limited period
- [4. (*for Class C felony*) and while committing the offense the Defendant  
(drew or used a deadly weapon)  
(inflicted bodily injury on [*name*], another person)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of escape, a Class D/C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms “bodily injury,” “deadly weapon” and “lawful detention” are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-8 and I.C. 35-41-1-18; Instruction Nos. 14.13, 14.49 and 14.125.



**Instruction No. 5.39. Failure to Appear.****I.C. 35-44-3-6.**

The crime of failure to appear is defined by statute as follows:

A person who, having been released from lawful detention on condition that Defendant appear at a specified time and place in connection with a charge of a crime, intentionally fails to appear at that time and place commits failure to appear, a Class A misdemeanor. [The offense is a Class D felony if the charge was a felony charge.]

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. after being released from lawful detention on the condition Defendant appear at a specified time and place in connection with a charge of crime
3. intentionally failed to appear at that specified time and place
4. [(for Class D felony) and the charge of crime for which Defendant was to appear was a felony charge].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of failure to appear, a Class A misdemeanor/Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term "lawful detention" is defined by law. See I.C. 35-41-1-18; Instruction No. 14.125.

By express provision in I.C. 35-44-3-6, failure to appear does not apply to obligations to appear incident to release on suspended sentence, probation or parole. The Committee believes that this is an exception which the Defendant must prove by a preponderance of the evidence.

**Instruction No. 5.41. Trafficking with an Inmate.****I.C. 35-44-3-9.**

The crime of trafficking with an inmate is defined by statute as follows:

A person who, without the prior authorization of the person in charge of a penal facility, knowingly or intentionally delivers, or carries into the penal facility with intent to deliver, an article to an inmate of the facility, or carries or receives with intent to carry out of the penal facility, an article from an inmate of the facility, commits trafficking with an inmate, a Class A misdemeanor. [The offense is a Class C felony if the article is a (controlled substance) (deadly weapon) (cellular telephone or other wireless or cellular communication device).]

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. without prior authorization of the person in charge of [*name of penal facility*]
4. [delivered an article to (*name*), an inmate of (*name of penal facility*)]

[carried an article into (*name of penal facility*) with the intent to deliver the article to (*name*), an inmate of (*name of penal facility*)]

[carried an article from (*name*), an inmate of (*name of penal facility*) with the intent to carry such article out of (*name of penal facility*)]

[received an article from (*name*), an inmate of (*name of penal facility*), with the intent to carry such article out of (*name of penal facility*)]

- [5. and the article was (*name article*), which was a (controlled substance) (deadly weapon) (a cellular telephone or other wireless or cellular communication device)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of trafficking with an inmate, a Class A misdemeanor/Class C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "penal facility," "deadly weapon," and "controlled substance" are defined by law. See I.C. 35-41-1-21, I.C. 35-41-1-8, and I.C. 35-48-1-1; Instruction Nos. 14.31, 14.49, and 14.149.



**Instruction No. 5.42. Trafficking with an Inmate Outside a Facility.****I.C. 35-44-3-9.3.**

The crime of trafficking with an inmate outside a facility is defined by law as follows:

A person who,

with the intent of providing

[alcohol]

[a cigarette or tobacco product]

[a controlled substance]

[an item that may be used as a weapon]

to a person who is

- (1) [incarcerated in a penal facility] or [detained in a juvenile facility]
- (2) on a full-time basis as the result of a [conviction] or [juvenile adjudication]
- (3) who has been or is being transported to another location to participate in or prepare for a judicial proceeding,

[delivers

(alcohol)

(a cigarette or tobacco product)

(a controlled substance)

(an item that may be used as a weapon)

to a person who is

- (1) [incarcerated in a penal facility] or [detained in a juvenile facility]
- (2) on a full-time basis as the result of a [conviction] or [juvenile adjudication]
- (3) who has been or is being transported to another location to participate in or prepare for a judicial proceeding,

[or]

[places

(alcohol)

(a cigarette or tobacco product)

(a controlled substance)

(an item that may be used as a weapon)

in a location where a person

- (1) [incarcerated in a penal facility] or [detained in a juvenile facility]
- (2) on a full-time basis as the result of a [conviction] or [juvenile adjudication]

- (3) who has been or is being transported to another location to participate in or prepare for a judicial proceeding

could obtain the

- (alcohol)
- (cigarette or tobacco product)
- (controlled substance)
- (item that may be used as a weapon)

commits trafficking with an inmate outside a facility, a Class [A misdemeanor (*for alcohol, cigarettes, or tobacco products*)] [D felony (*for a controlled substance*)] [C felony (*for an item that may be used as a weapon*)].

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. with the intent of providing
  - [alcohol]
  - [a cigarette or tobacco product]
  - [a controlled substance]
  - [an item that may be used as a weapon]

to a person who was

- (1) [incarcerated in a penal facility] or [detained in a juvenile facility]
- (2) on a full-time basis as the result of a [conviction] or [juvenile adjudication]
- (3) who had been or was being transported to another location to participate in or prepare for a judicial proceeding;

3. [delivered
  - (alcohol)
  - (a cigarette or tobacco product)
  - (a controlled substance)
  - (an item that may be used as a weapon)

to (*name alleged inmate*), who was

- (1) [incarcerated in (*name facility*), a penal facility] or [detained in a (*name facility*), a juvenile facility]
- (2) on a full-time basis as the result of a [conviction] or [juvenile adjudication]



- (3) and who had been or was being transported to another location to participate in or prepare for a judicial proceeding,

[or]

[placed

(alcohol)

(a cigarette or tobacco product)

(a controlled substance)

(an item that may be used as a weapon)

in a location where a person

- (1) [incarcerated in a penal facility] or [detained in a juvenile facility]
- (2) on a full-time basis as the result of a [conviction] or [juvenile adjudication]
- (3) who has been or is being transported to another location to participate in or prepare for a judicial proceeding

could obtain the

(alcohol)

(cigarette or tobacco product)

(controlled substance)

(item that may be used as a weapon)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of trafficking with an inmate outside a facility, a Class A misdemeanor/Class D/C felony, as charged in Count \_\_\_\_\_.

**Instruction No. 5.42.5. Possessing Deadly Weapon in Penal or Juvenile Facility.**

**I.C. 35-44.1-3-5(d).**

The crime of possessing a deadly weapon in a [penal] [juvenile] facility is defined by law as follows:

A person who is not an inmate of a [penal] [juvenile] facility and knowingly or intentionally [possesses in] [carries into] [causes] a deadly weapon to be brought into] the [penal] [juvenile] facility without the prior authorization of the person in charge of the [penal] [juvenile] facility commits possessing a deadly weapon in a [penal] [juvenile] facility, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [possessed in] [carried into] [caused]
4. [*describe alleged weapon*], which was a deadly weapon
5. to be brought into
6. [*describe alleged facility*], which was a [penal] [juvenile] facility
7. without the prior authorization of the person in charge of the [penal] [juvenile] facility.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possessing a deadly weapon in a [penal] [juvenile] facility, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The terms “penal facility,” “deadly weapon,” and “juvenile facility” are defined by law. See I.C. 35-41-1-21, I.C. 35-41-1-8, and I.C. 35-44.1-3-5; Instruction Nos. 14.31, 14.49, and 14.119.2.



**Instruction No. 5.43. Possession of Dangerous Material by Incarcerated Person.**

**I.C. 35-44-3-9. 5.**

The crime of possession of dangerous material by an incarcerated person is defined by statute as follows:

A person who knowingly or intentionally while incarcerated in a penal facility possesses a device, equipment, a chemical substance, or other material that is used or is intended to be used in a manner that is readily capable of causing bodily injury commits a Class C felony. [The offense is a Class B felony if the device, equipment, chemical substance, or other material is a deadly weapon.]

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. while incarcerated in a penal facility
4. possessed [*name alleged device, equipment, chemical substance, or other material*]
5. when [*name alleged device, equipment, chemical substance, or other material*] was ordinarily used or ordinarily intended to be used in a manner readily capable of causing bodily injury
- [6. (*for Class B felony*) and (*name alleged device, equipment, chemical substance, or other material*) was a deadly weapon].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of dangerous material by an incarcerated person, a Class C/B felony, charged in Count \_\_\_\_\_.

**Comments**

The terms “bodily injury,” “deadly weapon,” and “penal facility” are defined by law. See I.C. 35-41-1-4, I.C. 35-41-1-8, and I.C. 35-41-1-21; Instruction Nos. 14.13, 14.49, and 14.149.

(Text continued on page 5-61)

Exhibit A to the Affidavit of the Special Agent in Charge of the New York City Police Department, dated and captioned as above.

10/10/11

Enclosed herewith are two copies of a letterhead memorandum (LHM) dated and captioned as above, which was prepared by the New York City Police Department on October 10, 2011. The LHM contains information regarding the activities of the New York City Police Department's Community Policing Bureau, which is a part of the New York City Police Department's Community Policing Division. The LHM also contains information regarding the activities of the New York City Police Department's Community Policing Bureau, which is a part of the New York City Police Department's Community Policing Division.

The LHM is being provided to you for your information. It is not intended to be used as evidence in any legal proceeding. The LHM is being provided to you for your information. It is not intended to be used as evidence in any legal proceeding. The LHM is being provided to you for your information. It is not intended to be used as evidence in any legal proceeding.

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**Instruction No. 5.45. Impersonating a Firefighter.****I.C. 35-44-4-7.**

The crime of impersonating a firefighter is defined as follows:

A person other than a firefighter who, with intent to mislead a firefighter or law enforcement officer as to the person's status as a dispatched firefighter, knowingly or intentionally enters an emergency incident area while wearing, transporting, or otherwise possessing a uniform, fire protective clothing, or fire protective gear commits a Class A misdemeanor. [The offense is a Class D felony if, as a proximate result of the person entering the emergency incident area, a person or firefighter suffers bodily injury.]

To convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. with intent to mislead a firefighter or law enforcement officer as to the person's status as a dispatched firefighter
3. knowingly or intentionally
4. entered
5. an emergency incident area while wearing, transporting, or otherwise possessing a uniform, fire protective clothing, or fire protective gear

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of impersonating a firefighter, a Class A misdemeanor/D felony charged in Count \_\_\_\_\_.

6. and as a proximate result of the Defendant's entering the emergency incident area       [name]      , [a person] [a firefighter] suffered bodily injury.

**Comments**

The terms "bodily injury," "dispatched firefighter," "emergency incident area," "firefighter," and "fire protective clothing and fire protective gear" are defined by law. See I.C. 35-41-1-4, 35-44-4-1, 35-44-4-2, 35-44-4-3, and 35-44-4-4. Instruction Nos. 14.13, 14.60, 14.76, 14.88, and 14.88a.

**Instruction No. 5.47.1. Failure of Offender to Register — Living in Indiana.**

**I.C. 11-8-8-17.**

The crime of failure of an offender to register is defined by law as follows:

A person who

- is an offender as defined by IC 11-8-8-5 and
- resides in Indiana by (spending) (intending to spend) at least seven (7) days, including part of a day, in Indiana during a one hundred eighty (180) day period and
- [knowingly] [intentionally] fails to register as an offender with
  - (the sheriff of a county in which the offender resides)
  - or
  - (the police chief of the consolidated city in which the offender resides)

commits failure to register, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was an offender with a duty to register because (he)(she) had been convicted of (*insert IC 11-8-8-5 offense or delinquency status alleged*) and
3. resided in Indiana by [having spent] [having intended to spend] at least seven (7) days, including any part of a day, in Indiana during the one hundred eighty (180) day period beginning on [*insert beginning date*] and ending on [*insert ending date*] and
4. [knowingly] [intentionally]
5. failed to register as an offender with

[the sheriff of the county where the offender resided]

[or]

[the police chief of the consolidated city in which the offender resided]].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of failure of offender to register, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term “offender” used in this instruction is a substitute for the “sex or violent offender” terminology in IC 11-8-8-5. The instruction avoids using “sex or violent offender” for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term “serious violent felon” in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an “offender,” it is suggested that the court



use only the "was an offender with a duty to register" language and then advise the jury that they are instructed to consider the defendant to be an "offender" with a duty to register because the State and the defendant have stipulated he was.

Trial of failure of an offender to register as a Class C felony due to a prior unrelated conviction of a registration offense must be bifurcated. See Instruction No. 15.85.

**Instruction No. 5.47.2. Failure of Offender to Register — Property in Indiana.**

**I.C. 11-8-8-17.**

The crime of failure of an offender to register is defined by law as follows:

A person who

- is an offender as defined by IC 11-8-8-5 and
- by statutory definition resides in Indiana because he owns real property in Indiana and returns to Indiana at any time and
- [knowingly] [intentionally] fails to register as an offender with
  - (the sheriff of the county where the real property is located)
  - or
  - (the police chief of the consolidated city in which the property is located)

commits failure to register, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was an offender with a duty to register because (he)(she) had been convicted of (*insert IC 5-2-12-4 offense or delinquency status alleged*) and
3. returned to Indiana at a time when he owned real property in [(name county) County, Indiana] [(name consolidated city), Indiana], and
4. [knowingly] [intentionally]
5. failed to register as an offender with
 

[the sheriff of (name county in which the real property was located) County, Indiana]

[or]

the police chief of (name consolidated city in which the real property was located), Indiana].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of failure of offender to register, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term “offender” used in this instruction is a substitute for the “sex or violent offender” terminology in IC 11-8-8-5. The instruction avoids using “sex or violent offender” for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term “serious violent felon” in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior



conviction or adjudication making him an "offender," it is suggested that the court use only the "was an offender with a duty to register" language and then advise the jury that they are instructed to consider the defendant to be an "offender" with a duty to register because the State and the defendant have stipulated he was.

Trial of failure of an offender to register as a Class C felony due to a prior unrelated conviction of a registration offense must be bifurcated. See Instruction No. 15.85.

**Instruction No. 5.47.3. Failure of Offender to Register — Work in Indiana.****I.C. 11-8-8-17.**

The crime of failure of an offender to register is defined by law as follows:

A person who

- is an offender as defined by IC 11-8-8-5 and
- [works or carries on a vocation in Indiana] [intends to work or carry on a vocation in Indiana] full-time or part-time [for a period of time exceeding seven (7) consecutive days] [for an aggregate period of time exceeding fourteen (14) days] during any calendar year in Indiana, whether the offender is financially compensated, volunteered, or is acting for the purpose of government or educational benefit, and
- [knowingly] [intentionally] fails to register as an offender with [the sheriff of the county] [the police chief of the consolidated city] where the person [is employed or carries on a vocation] [intends to be employed or carry on a vocation]

commits failure to register, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was an offender with a duty to register because (he)(she) had been convicted of (*insert IC 11-8-8-5 offense or delinquency status alleged*) and
3. [worked or carried on a vocation in Indiana]  
[or]  
[intended to work or carry on a vocation in Indiana]
4. [full-time] [part-time]

[for a period of time exceeding seven (7) consecutive days]

[for an aggregate period of time exceeding fourteen (14) days during a calendar year]

5. and [knowingly] [intentionally]

6. failed to register as an offender with

[the sheriff of (*name County*), (the) (a) county where the Defendant (was) (intended to be) employed or (was carrying) (intended to carry) on a vocation]

[or]

[the police chief of Indianapolis, the consolidated city where the Defendant (was) (intended to be) employed or (was carrying) (intended to carry) on a vocation].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of failure of offender to register, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term “offender” used in this instruction is a substitute for the “sex or



violent offender” terminology in IC 11-8-8-5. The instruction avoids using “sex or violent offender” for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term “serious violent felon” in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an “offender,” it is suggested that the court use only the “was an offender with a duty to register” language and then advise the jury that they are instructed to consider the defendant to be an “offender” with a duty to register because the State and the defendant have stipulated he was.

Trial of failure of an offender to register as a Class C felony due to a prior unrelated conviction of a registration offense must be bifurcated. See Instruction No. 15.85.

**Instruction No. 5.47.4. Failure of Offender to Register — School in Indiana.****I.C. 11-8-8-17.**

The crime of failure of an offender to register is defined by law as follows:

A person who

- is an offender as defined by IC 11-8-8-5 and
- [is enrolled] [intends to be enrolled] on a full-time or part-time basis in any public or private educational institution, including any (secondary school) (trade institution) (professional institution) (postsecondary educational institution) in Indiana and
- [knowingly] [intentionally] fails to register as an offender with [the sheriff of the county] [the police chief of the consolidated city] where the Defendant [is] [intends to be] enrolled as a student)

commits failure to register, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was an offender with a duty to register because (he)(she) had been convicted of (*insert IC 11-8-8-5 offense or delinquency status alleged*) and
3. [was enrolled] [intended to be enrolled]
4. on a [full-time] [part-time] basis
5. in (*name institution*), which was a public or private educational institution in (*name county*), Indiana,
6. and [knowingly] [intentionally]
7. failed to register as an offender with

[the sheriff of (*name county*), Indiana, where the Defendant (was) (intended to be) enrolled as a student]

[or]

[the police chief of (*name city*), the consolidated city where the Defendant (was) (intended to be) enrolled as a student].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of failure of offender to register, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term “offender” used in this instruction is a substitute for the “sex or violent offender” terminology in IC 11-8-8-5. The instruction avoids using “sex or violent offender” for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term “serious violent felon”



in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an "offender," it is suggested that the court use only the "was an offender with a duty to register" language and then advise the jury that they are instructed to consider the defendant to be an "offender" with a duty to register because the State and the defendant have stipulated he was.

Trial of failure of an offender to register as a Class C felony due to a prior unrelated conviction of a registration offense must be bifurcated. See Instruction No. 15.85.

**Instruction No. 5.47.5. Registration Misstatement or Omission.****I.C. 11-8-8-17.**

The crime of offender misstatement or omission is defined by law as follows:

A person who

- is an offender as defined by IC 11-8-8-5 and
- [knowingly] [intentionally]
- makes a material misstatement or omission while registering as an offender

commits registration misstatement or omission, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was an offender with a duty to register because (he) (she) had been convicted of (*insert IC 11-8-8-5 offense or delinquency status alleged*) and
3. was required by law to provide (*describe here the particular registration information in IC 11-8-8-8 which should have been provided*) and
4. [knowingly] [intentionally]
5. (*describe alleged misstatement or omission*)
6. which was a material registration (misstatement) (omission).

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of registration misstatement or omission, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term “offender” used in this instruction is a substitute for the “sex or violent offender” terminology in IC 11-8-8-5. The instruction avoids using “sex or violent offender” for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term “serious violent felon” in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an “offender,” it is suggested that the court use only the “was an offender with a duty to register” language and then advise the jury that they are instructed to consider the defendant to be an “offender” with a duty to register because the State and the defendant have stipulated he was.

Trial of failure of an offender to register as a Class C felony due to a prior unrelated conviction of a registration offense must be bifurcated. See Instruction No. 15.85.

This instruction does not attempt to list all the varieties of misstatement or omission which are possible. The required registration information is established by I.C. 11-8-8-8, as amended effective July 1, 2007 by P.L. 216-2007, which provides:



The registration required under this chapter must include the following information:

- (1) The sex or violent offender's full name, alias, any name by which the sex or violent offender was previously known, date of birth, sex, race, height, weight, hair color, eye color, any scars, marks, or tattoos, Social Security number, driver's license number or state identification card number, vehicle description and vehicle plate number for any vehicle the sex or violent offender owns or operates on a regular basis, principal residence address, other address where the sex or violent offender spends more than seven (7) nights in a fourteen (14) day period, and mailing address, if different from the sex or violent offender's principal residence address.
- (2) A description of the offense for which the sex or violent offender was convicted, the date of conviction, the county of the conviction, the cause number of the conviction, and the sentence imposed, if applicable.
- (3) If the person is required to register under section 7(a)(2) or 7(a)(3) of this chapter, the name and address of each of the sex or violent offender's employers in Indiana, the name and address of each campus or location where the sex or violent offender is enrolled in school in Indiana, and the address where the sex or violent offender stays or intends to stay while in Indiana.
- (4) A recent photograph of the sex or violent offender.
- (5) If the sex or violent offender is a sexually violent predator, that the sex or violent offender is a sexually violent predator.
- (6) If the sex or violent offender is required to register for life, that the sex or violent offender is required to register for life.
- (7) Any other information required by the department [of Correction].

**Instruction No. 5.47.6. Failure to Register In Person.****I.C. 11-8-8-17.**

The crime of failure of an offender to register in person is defined by law as follows:

A person who

- is an offender as defined by IC 11-8-8-5 and
- [knowingly] [intentionally] fails to register in person as required under this chapter [IC 11-8-8]

commits failure to register in person, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was an offender with a duty to register because (he) (she) had been convicted of (*insert IC 11-8-8-5 offense or delinquency status alleged*) and
3. was required by law to register in person with (*describe location at which alleged in-person registration was required*) and
4. [knowingly] [intentionally]
5. failed to register in person.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of failure of offender to register in person, a class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term “offender” used in this instruction is a substitute for the “sex or violent offender” terminology in IC 11-8-8-5. The instruction avoids using “sex or violent offender” for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term “serious violent felon” in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an “offender,” it is suggested that the court use only the “was an offender with a duty to register” language and then advise the jury that they are instructed to consider the defendant to be an “offender” with a duty to register because the State and the defendant have stipulated he was.

Trial of failure of an offender to register in person as a Class C felony due to a prior unrelated conviction of a registration offense must be bifurcated. See Instruction No. 15.85.



**Instruction No. 5.47.7. Failure to Reside at Registered Address or Location.****I.C. 11-8-8-17.**

The crime of failure of an offender to reside at registered address is defined by law as follows:

A person who

- is an offender as defined by IC 11-8-8-5 and
- [knowingly] [intentionally]
- does not reside at the offender's registered address or location

commits failure of an offender to reside at registered address, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was an offender with a duty to register because (he) (she) had been convicted of (*insert IC 11-8-8-5 offense or delinquency status alleged*) and
3. had registered as an offender with (*name local law enforcement agency*) and
4. had provided as (his) (her) registered address or location (*insert registered address provided by Defendant*) and
5. [knowingly] [intentionally]
6. did not reside at that registered address or location.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of failure of an offender to reside at registered address, a Class D felony charged in Count \_\_\_\_\_.

**Comments**

The term "offender" used in this instruction is a substitute for the "sex or violent offender" terminology in IC 11-8-8-5. The instruction avoids using "sex or violent offender" for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term "serious violent felon" in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an "offender," it is suggested that the court use only the "was an offender with a duty to register" language and then advise the jury that they are instructed to consider the defendant to be an "offender" with a duty to register because the State and the defendant have stipulated he was.

Trial of failure of an offender to reside at registered address as a Class C felony due to a prior unrelated conviction of a registration offense must be bifurcated. See Instruction No. 15.85.



### Instruction No. 5.49. Lifetime Parole Violation — Contact with Child or Victim.

#### I.C. 35-44-3-13.

The crime of violation of lifetime parole condition involving child or victim is defined by statute as follows:

A person who is being supervised on lifetime parole (as described in I.C. 35-50-6-1) and who knowingly or intentionally violates a condition of lifetime parole that involves direct or indirect contact [with a child less than sixteen (16) years of age] [with the victim of a sex crime described in I.C. 11-8-8-5 that was committed by the person] and at the time of the violation, (the person's lifetime parole has been revoked two (2) or more times) (the person has completed the person's sentence, including any credit time the person may have earned) commits violation of lifetime parole condition involving child or victim, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. while being supervised on lifetime parole
3. and

[after the Defendant's lifetime parole had been revoked two times]

[or]

[after the Defendant had completed [his] or [her] sentence, including any credit time Defendant had earned]

4. [knowingly] [intentionally]
5. violated a condition of the lifetime parole that [prohibited] [restricted] [involved] direct or indirect contact

[with a child less than sixteen (16) years of age)]

[or]

[with (name alleged crime victim), who was the victim of a (name alleged, I.C. 11-8-8-5 crime) which had been committed by the Defendant]

6. by (describe alleged parole condition violation).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of violation of lifetime parole condition involving child or victim, a Class D/C felony, as charged in Count \_\_\_\_\_.

#### Comments

Trial of this offense as a C felony for having a prior unrelated conviction must be bifurcated. See Chapter 15, Instruction No. 15.91.

The crimes listed in I.C. 11-8-8-5 are:



- (1) Rape (I.C. 35-42-4-1).
- (2) Criminal deviate conduct (I.C. 35-42-4-2).
- (3) Child molesting (I.C. 35-42-4-3).
- (4) Child exploitation (I.C. 35-42-4-4(b)).
- (5) Vicarious sexual gratification (I.C. 35-42-4-5).
- (6) Child solicitation (I.C. 35-42-4-6).
- (7) Child seduction (I.C. 35-42-4-7).
- (8) Sexual misconduct with a minor as a Class A, Class B, or Class C felony (I.C. 35-42-4-9).
- (9) Incest (I.C. 35-46-1-3).
- (10) Sexual battery (I.C. 35-42-4-8).
- (11) Kidnapping (I.C. 35-42-3-2), if the victim is less than eighteen (18) years of age.
- (12) Criminal confinement (I.C. 35-42-3-3), if the victim is less than eighteen (18) years of age.
- (13) Possession of child pornography (I.C. 35-42-4-4(c)), if the person has a prior unrelated conviction for possession of child pornography (I.C. 35-42-4-4(c)).
- (14) An attempt or conspiracy to commit a crime listed in subdivisions (1) through (13).
- (15) A crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to any of the offenses listed in subdivisions (1) through (14).

**Instruction No. 5.51. Failure of an Offender to Possess Identification.****I.C. 11-8-8-15.**

The crime of failure of an offender to keep a valid license is defined by law as follows:

A person who

- is an offender as defined by IC 11-8-8-5 and
- is a resident of Indiana and
  - [knowingly] [intentionally]
  - fails to obtain and keep in the person's possession
    - (a valid Indiana driver's license)
    - or
    - (a valid Indiana identification card)
    - or
    - is not a resident of Indiana and is required to register in Indiana and
  - [knowingly] [intentionally]
  - fails to obtain and keep in the person's possession
    - (a valid driver's license issued by the state in which the offender resides
    - or
    - (a valid state-issued identification card issued by the state in which the offender resides)

commits failure of an offender to possess identification, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was an offender with a duty to register because (he) (she) had been convicted of (*insert IC 11-8-8-5 offense or delinquency status alleged*) and
3. [*was a resident of Indiana*] [*was not a resident of Indiana but was required to register in Indiana*] and
4. [knowingly] [intentionally]
5. [{for resident} failed to (obtain) (keep) in (his) (her) possession

(a valid Indiana driver's license)

or

(a valid Indiana identification card)]



or

[{for non-resident} failed to (obtain) (keep) in (his) (her) possession

(a valid driver's license issued by the state in which the Defendant resided)

or

(a valid state-issued identification card issued by the state in which the Defendant resided).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of failure of an offender to possess identification, a Class A misdemeanor, charged in Count \_\_\_\_\_.

### Comments

The term "offender" used in this instruction is a substitute for the "sex or violent offender" terminology in IC 11-8-8-5. The instruction avoids using "sex or violent offender" for the same reasons that *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) urged trial courts not to use the term "serious violent felon" in I.C. 35-47-4-5 trials. If the parties stipulate that the defendant has a prior conviction or adjudication making him an "offender," it is suggested that the court use only the "was an offender with a duty to register" language and then advise the jury that they are instructed to consider the defendant to be an "offender" with a duty to register because the State and the defendant have stipulated he was.

Trial of failure of an offender to possess identification as a Class D felony due to a prior unrelated conviction of a registration offense must be bifurcated. See Instruction No. 15.93. Trial of failure of an offender to possess identification as a Class D felony due to sexually violent predator status is strongly-recommended for bifurcated trial, with Instruction No. 15.93.

**Instruction No. 5.53. False Verification of Citizenship or Immigration Status.****I.C. 12-32-1-7.**

The crime of false verification of citizenship or immigration status is defined by law as follows:

A person who knowingly or intentionally makes a false, fictitious, or fraudulent statement or representation in a verification to determine eligibility for [a federal] [a state or local] public benefit required by an [agency] [political subdivision] commits false verification of citizenship or immigration status, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. stated or represented [*recite alleged statement or representation*] on a verification form to determine eligibility for [a federal] [a state or local] public benefit required by [*name alleged agency or political subdivision*], which was an [agency] [political subdivision]
4. and the Defendant's statement or representation was knowingly or intentionally false, fictitious, or fraudulent.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of false verification of citizenship or immigration status, a Class D felony charged in Count \_\_\_\_\_.

**Comments**

The terms "agency," "federal public benefit," and "state or local public benefit" are defined by law. See Instruction Nos. 14.08.5, 14.84.5, and 14.194; I.C. 12-32-1-1, I.C. 12-32-1-2, and 12-32-1-3.



**Instruction No. 5.55. Transporting an Illegal Alien.****I.C. 35-44-5-3.**

The crime of transporting an illegal alien is defined by law as follows:

A person who knowingly or intentionally transports or moves an alien, for the purpose of commercial advantage or private financial gain, knowing or in reckless disregard of the fact that the alien has [come to] [entered] [remained in] the United States in violation of the law commits transporting an illegal alien, a Class A misdemeanor. [The offense is a Class D felony if it involves more than nine (9) aliens.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [transported] [moved]
4. [an alien] [aliens]
5. for the purpose of commercial or private financial gain
6. when the Defendant [knew] [acted in reckless disregard of the fact that] the alien[s] had  
[come to]  
[or]  
[entered]  
[or]  
[remained in]  
the United States in violation of the law

[7. (*For Class D felony*) and the offense involved ten (10) or more aliens].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of transporting an illegal alien, a Class A misdemeanor/Class D felony charged in Count \_\_\_\_\_.

**Comments**

The term "alien" is defined by law. See Instruction No. 14.09.55; I.C. 35-44-5-2.

I.C. 35-44-5-1 provides that this offense does not apply to:

- (1) A church or religious organization conducting activity that is protected by the First Amendment to the United States Constitution.
- (2) The provision of assistance for health care items and services that are necessary for the treatment of an emergency medical condition of an individual.

- (3) A health care provider (as defined in IC 16-18-2-163(a)) that is providing health care services.
- (4) An attorney or other person that is providing legal services.
- (5) A person who:
  - (A) is a spouse of an alien or who stands in relation of parent or child to an alien; and
  - (B) would otherwise commit an offense under this chapter with respect to the alien.
- (6) A provider that:
  - (A) receives federal or state funding to provide services to victims of domestic violence, sexual assault, human trafficking, or stalking; and
  - (B) is providing the services described in clause (A).
- (7) An employee of Indiana or a political subdivision (as defined in IC 36-1-2-13) if the employee is acting within the scope of the employee's employment.
- (8) An employee of a school acting within the scope of the employee's employment.



**Instruction No. 5.57. Harboring an Illegal Alien.****I.C. 35-44-5-4.**

The crime of harboring an illegal alien is defined by law as follows:

A person who knowingly or intentionally [conceals] [harbors] [shields from detection] an alien in any place, [including a building] [including a means of transportation], for the purpose of commercial advantage or private financial gain, knowing or in reckless disregard of the fact that the alien has [come to] [entered] [remained in] the United States in violation of law commits harboring an illegal alien, a Class A misdemeanor. [The offense is a Class D felony if it involves more than nine (9) aliens.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [concealed] [harbored] [shields from detection]
4. [an alien] [aliens]
5. in [*name alleged place*] a [place] [building] [means of transportation]
6. for the purpose of commercial or private financial gain
7. when the Defendant [knew] [acted in reckless disregard of the fact that] the alien[s] had  
[come to]  
[or]  
[entered]  
[or]  
[remained in]  
the United States in violation of law

- [8. (*For Class D felony*) and the offense involved ten (10) or more aliens].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of harboring an illegal alien, a Class A misdemeanor/Class D felony charged in Count \_\_\_\_\_.

**Comments**

The presence of the fifth element in this offense prevented its consolidation with Instruction No. 5.55, Transporting an Illegal Alien.

The term "alien" is defined by law. See Instruction No. 14.09.55; I.C. 35-44-5-2. The term "harbor" is defined as an optional instruction for use with this offense. See Instruction No. 14.102.

I.C. 35-44-5-4(c) provides that a landlord that rents real property to a person who is an alien does not violate this section as a result of renting the property to the person.

I.C. 35-44-5-1 provides that this offense does not apply to:

- (1) A church or religious organization conducting activity that is protected by the First Amendment to the United States Constitution.
- (2) The provision of assistance for health care items and services that are necessary for the treatment of an emergency medical condition of an individual.
- (3) A health care provider (as defined in IC 16-18-2-163(a)) that is providing health care services.
- (4) An attorney or other person that is providing legal services.
- (5) A person who:
  - (A) is a spouse of an alien or who stands in relation of parent or child to an alien; and
  - (B) would otherwise commit an offense under this chapter with respect to the alien.
- (6) A provider that:
  - (A) receives federal or state funding to provide services to victims of domestic violence, sexual assault, human trafficking, or stalking; and
  - (B) is providing the services described in clause (A).
- (7) An employee of Indiana or a political subdivision (as defined in IC 36-1-2-13) if the employee is acting within the scope of the employee's employment.
- (8) An employee of a school acting within the scope of the employee's employment.



## **CHAPTER 6**

# **OFFENSES AGAINST PUBLIC HEALTH, ORDER AND DECENCY**

### **SYNOPSIS**

- Instruction No. 6.01.    Rioting.**
- Instruction No. 6.02.    Disorderly Conduct.**
- Instruction No. 6.03.    Intimidation.**
- Instruction No. 6.05.    Poisoning Public Water.**
- Instruction No. 6.07.    Prostitution.**
- Instruction No. 6.09.    Patronizing a Prostitute.**
- Instruction No. 6.11.    Promoting Prostitution.**
- Instruction No. 6.12.    Voyeurism.**
- Instruction No. 6.12.1.    Public Voyeurism.**
- Instruction No. 6.12.5.    Public Indecency.**
- Instruction No. 6.15.    Promoting Professional Gambling (Gambling Device).**
- Instruction No. 6.17.    Promoting Professional Gambling (Gambling Information).**
- Instruction No. 6.19.    Promoting Professional Gambling (Providing a Place).**
- Instruction No. 6.20.1.    Unlawful Gambling on the Internet.**
- Instruction No. 6.20.2.    Professional Gambling Over Internet—General.**
- Instruction No. 6.20.3.    Professional Gambling Over Internet—Slot Machines and Other Equipment.**
- Instruction No. 6.21.    Loansharking.**
- Instruction No. 6.23.    Corrupt Business Influence.**
- Instruction No. 6.24.    Money Laundering.**
- Instruction No. 6.24a.    Money Laundering.**
- Instruction No. 6.25.    Consumer Product Tampering (Poison).**
- Instruction No. 6.27.    Consumer Product Tampering (Label).**
- Instruction No. 6.29.    Criminal Gang Activity.**
- Instruction No. 6.30.    Criminal Gang Recruitment.**
- Instruction No. 6.31.    Criminal Gang Intimidation.**
- Instruction No. 6.33.    Failure to Restrain a Dog.**

Instruction No. 6.35. Stalking.

Instruction No. 6.37. Abuse of a Corpse.

CHARGE

OFFENSES AGAINST PUBLIC DECENTRY

STALKING

1. A person is guilty of stalking if he or she follows another person with the intent to harass or annoy that person.

2. A person is guilty of stalking if he or she follows another person with the intent to cause that person to believe that the person is in danger of physical harm.

3. A person is guilty of stalking if he or she follows another person with the intent to cause that person to believe that the person is in danger of financial harm.

4. A person is guilty of stalking if he or she follows another person with the intent to cause that person to believe that the person is in danger of reputational harm.

5. A person is guilty of stalking if he or she follows another person with the intent to cause that person to believe that the person is in danger of emotional harm.

6. A person is guilty of stalking if he or she follows another person with the intent to cause that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm.

7. A person is guilty of stalking if he or she follows another person with the intent to cause that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm, and the person's conduct is a substantial factor in causing that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm.

8. A person is guilty of stalking if he or she follows another person with the intent to cause that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm, and the person's conduct is a substantial factor in causing that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm, and the person's conduct is a substantial factor in causing that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm.

9. A person is guilty of stalking if he or she follows another person with the intent to cause that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm, and the person's conduct is a substantial factor in causing that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm, and the person's conduct is a substantial factor in causing that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm.

10. A person is guilty of stalking if he or she follows another person with the intent to cause that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm, and the person's conduct is a substantial factor in causing that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm, and the person's conduct is a substantial factor in causing that person to believe that the person is in danger of physical harm, financial harm, reputational harm, or emotional harm.



**Instruction No. 6.01. Rioting.****I.C. 35-45-1-2.**

The crime of rioting is defined by law as follows:

A person who, being a member of an unlawful assembly, recklessly, knowingly, or intentionally engages in tumultuous conduct commits rioting, a Class A misdemeanor. [The offense is a Class D felony if it is committed while armed with a deadly weapon.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. while he/she was a member of an unlawful assembly
3. recklessly, knowingly, or intentionally
4. engaged in tumultuous conduct
5. [(for Class D felony) and Defendant committed the offense while armed with a deadly weapon.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of rioting, a Class D felony, charged in Count

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**Comments**

The terms "unlawful assembly" and "tumultuous conduct" are defined by law. See I.C. 35-45-1-1; Instruction Nos. 14.205 and 14.213.

*(Text continued on page 6-3)*

Enclosed for the Department of Justice are two copies of the report of the Committee on the Judiciary, United States Senate, dated June 1, 1964, and captioned "Report of the Committee on the Judiciary, United States Senate, on the activities of the Central Intelligence Agency, 1954-1963".

The report is being furnished to the Department of Justice for its information and for its use in the conduct of its official duties. The report is being furnished to the Department of Justice for its information and for its use in the conduct of its official duties.

Very truly yours,

John Edgar Hoover  
Director



## 6-3 OFFENSES AGAINST PUBLIC HEALTH, ORDER AND DECENCY

### Instruction No. 6.02. Disorderly Conduct.

#### I.C. 35-45-1-3.

A person who recklessly, knowingly, or intentionally [engages in fighting or in tumultuous conduct], [makes unreasonable noise and continues to do so after being asked to stop], or [disrupts a lawful assembly of persons], commits disorderly conduct, a Class B misdemeanor. [The offense is a Class D felony if it (adversely affects airport security and is committed in an airport {as defined in I.C. 8-21-1-1} or on the premises of an airport, including in a parking area, a maintenance bay, or an aircraft hangar) (is committed within five-hundred {500} feet of the location where {a burial is being performed}, {a funeral procession, if the person knows that the funeral procession is taking place}, {a building in which [a funeral or memorial service], or [the viewing of a deceased person] is taking place and it adversely affects the [funeral], [burial], [viewing], [funeral procession], or [memorial service]})).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. [recklessly], [knowingly], or [intentionally];
3. [engaged in (fighting) or (tumultuous conduct)]  
[or]  
[made unreasonable noise and continued to do so after having been asked to stop]  
[or]  
[disrupted a lawful assembly of persons];
- [4. (*for Class D felony*) (in an airport) or (on the premises of an airport)  
and  
thereby adversely affected airport security];  
[or]
- [5. (*for Class D felony*) within five-hundred (500) feet of  
(the location where a burial was being performed)  
(or)

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(a funeral procession, when the Defendant knew the funeral procession was taking place)

(or)

(a building in which {a funeral}, {a memorial service}, or {the viewing of a deceased person} was being conducted)).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of disorderly conduct, a Class B misdemeanor/Class D felony, charged in Count \_\_\_\_\_.



**Instruction No. 6.03. Intimidation.****I.C. 35-45-2-1(a).**

The crime of intimidation is defined by statute as follows:

A person who communicates a threat to another person, with the intent [that the other person engage in conduct against his will] [the other person be placed in fear of retaliation for a prior lawful act] [of causing a (dwelling) (a building) (other structure)(a vehicle) to be evacuated] [interfering with the occupancy of (a dwelling) (building) (other structure) (a vehicle)] commits intimidation, a Class A misdemeanor. [The offense is a Class D felony [if the threat is to commit a forcible felony] [the person to whom the threat is communicated is (a law enforcement officer) (a witness or the spouse or child of a witness in any pending criminal proceeding against the person making the threat) (an employee of a school or a school corporation) (a community policing volunteer) (an employee of a court) (an employee of a probation department) (an employee of a community corrections program) (an employee of a hospital, church, or religious organization) (a person that owns a building or structure that is open to the public or is an employee of the person) and, except as provided for a witness of the spouse or child of a witness in any pending criminal proceeding against the person making the threat, the threat is communicated to the person (because of the occupation, profession, employment status, or ownership status of the person) (based on an act taken by the person within the scope of the occupation, profession, employment status, or ownership status of the person).] [or] [the threat is communicated using property, including electronic equipment or systems, of a school corporation, or other governmental entity.] [The offense is a Class C felony if (while committing it, the person draws or uses a deadly weapon) (the person to whom the threat is communicated [is a judge or bailiff of any court] [is a prosecuting attorney or a deputy prosecuting attorney]]].]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. communicated a threat to [name];
3. [with the intent that (name) engage in conduct against his will]

[or]

[with the intent that (name) be placed in fear of retaliation for a prior lawful act]

[or]

[with the intent of causing (a dwelling) (a building or other structure) (a vehicle) to be evacuated]

[or]

[with the intent of interfering with the occupancy of (a dwelling) (a building

or other structure) (a vehicle)]

[4. (for Class D felony) and

[the threat was to commit a forcible felony]

[or]

[(*name person threatened*) was (a law enforcement officer), (a witness or the spouse or child of a witness in any pending criminal proceeding against the person making the threat) (an employee of a school or a school corporation) (a community policing volunteer), (an employee of a court), (an employee of a probation department) (an employee of a community corrections program) (an employee of a {hospital} {church} {religious organization})]

[or]

[the threat was communicated using property, including electronic equipment or systems, of a school corporation or other government entity].

[5. (for Class C felony) (while committing the offense, the Defendant drew or used a deadly weapon)

(or)

(*{name person threatened}* was {a judge of a court} {a bailiff of a court} {a prosecuting attorney} {a deputy prosecuting attorney}).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty of intimidation, a Class A misdemeanor/Class D/C felony charged in Count \_\_\_\_\_.

### Comments

The terms “communicates,” “deadly weapon,” “forcible felony,” and “threat” are defined by law. See I.C. 35-45-2-1, 35-5-2-1, I.C. 35-41-1-8, and I.C. 35-41-1-11; Instruction Nos. 14.17c, 14.49, 14.89, and 14.203.

Trial of intimidation as a Class D felony due to a prior unrelated conviction concerning the same victim must be bifurcated. See Chapter 15.



**Instruction No. 6.05. Poisoning Public Water.****I.C. 35-45-3-1.**

The crime of poisoning public water is defined by law as follows:

A person who recklessly, knowingly, or intentionally poisons a public water supply commits poisoning, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. recklessly, knowingly or intentionally
3. poisoned a public water supply.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of poisoning public water, a Class D felony, charged in Count \_\_\_\_\_.

*(Text continued on page 6-7)*





**Instruction No. 6.07. Prostitution.**

**I.C. 35-45-4-2.**

The crime of prostitution is defined by law as follows:

A person who knowingly or intentionally performs, or offers or agrees to perform, sexual intercourse or deviate sexual conduct for money or other property, or fondles, or offers or agrees to fondle, the genitals of another person for money or other property commits prostitution, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [(performed) (offered to perform) (agreed to perform) sexual intercourse or deviate sexual conduct]  
[or]  
[(fondled) (offered to fondle) (agreed to fondle) the genitals of (name)]
4. for money or other property.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of prostitution, a Class A misdemeanor, charged in Count \_\_\_\_\_.

**Comments**

Trial of prostitution as a Class D felony must be bifurcated. See Chapter 15.

The terms "deviate sexual conduct," "property" and "sexual intercourse" are defined by law. See I.C. 35-41-1-9, I.C. 35-41-1-23 and I.C. 35-41-1-26; Instruction Nos. 14.57, 14.165 and 14.189.



**Instruction No. 6.09. Patronizing a Prostitute.****I.C. 35-45-4-3.**

The crime of patronizing a prostitute is defined as follows:

A person who knowingly or intentionally pays, or offers or agrees to pay, money or other property to another person for having engaged in, or on the understanding that the other person will engage in, sexual intercourse or deviate sexual conduct with the person or with any other person, or for having fondled, or on the understanding that the other person will fondle, the genitals of the person or any other person, commits patronizing a prostitute, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [paid] [offered to pay] [agreed to pay] [money or other property] to [name]
4. [for engaging in (sexual intercourse) (deviate sexual conduct) with the Defendant]

[or]

[on the understanding that (name) would engage in (sexual intercourse) (deviate sexual conduct) with the Defendant]

[or]

[on the understanding that (name) would fondle the genitals of the Defendant].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of patronizing a prostitute, a Class A misdemeanor, charged in Count \_\_\_\_\_.

**Comments**

Trial of patronizing a prostitute as a Class D felony must be bifurcated. See Chapter 15.

The terms "deviate sexual conduct," "property" and "sexual intercourse" are defined by law. See I.C. 35-41-1-9, I.C. 35-41-1-23 and I.C. 35-41-1-26; Instruction Nos. 14.57, 14.165 and 14.189.



**Instruction No. 6.11. Promoting Prostitution.****I.C. 35-45-4-4.**

The crime of promoting prostitution is defined by law as follows:

A person who knowingly or intentionally entices or compels another person to become a prostitute; knowingly or intentionally procures, or offers or agrees to procure, a person for another person for the purpose of prostitution; having control over the use of a place, knowingly or intentionally permits another person to use the place for prostitution; receives oney or other property from a prostitute, without lawful consideration, knowing it was earned in whole or in part from prostitution; or knowingly or intentionally conducts or directs another person to a place for the purpose of prostitution, commits promoting prostitution, a Class C felony. [The offense is a Class B felony if the person enticed or compelled is under 18 years of age.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [enticed or compelled (*name*) to become a prostitute]  
[or]  
[procured or offered or agreed to procure (*name*) for (*name*) for the purpose of prostitution]  
[or]  
[having control over the use of (*describe place*) permitted another person to use (*describe place*) for prostitution]  
[or]  
[received money or other property from (*name*), a prostitute, without lawful consideration knowing that such money or other property was earned in whole or in part from prostitution]  
[or]  
[conducted or directed (*name*) to (*describe place*) for the purpose of prostitution.]
4. [(for B felony) and ad the time Defendant enticed or compelled (*name*) to become a prostitute (*name*) was under eighteen (18) years of age.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of promoting prostitution, a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

A definition of "prostitute" or "prostitution" should be obtained from I.C. 35-45-4-2 and Instruction No. 6.07 and given with this instruction.



**Instruction No. 6.12. Voyeurism.****I.C. 35-45-4-5.**

The crime of voyeurism is defined by law as follows:

A person who [peeps into an occupied dwelling of another person without the consent of the other person] [goes upon the land of another with the intent to peep into an occupied dwelling of another person without the consent of the other person] [peeps into an area where an occupant of the area reasonably can be expected to disrobe, including restrooms, baths, showers, and dressing rooms, without the consent of the other person] commits voyeurism, a Class B misdemeanor. [The offense is a Class D felony if it is knowingly or intentionally committed by means of a camera.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [(peeped) (went upon the land of another with the intent to peep) into an occupied dwelling of (*name other person*)]

[or]

[peeped into (*describe area alleged in charge*) which was an area where an occupant of the area reasonably could be expected to disrobe, such as a (restroom) (bath) (shower) (dressing room)]

4. without the consent of [*name other person*]
- [5. (*for D felony*) and the offense was knowingly or intentionally committed by means of a camera].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of voyeurism, a Class B misdemeanor/Class D felony charged in Count \_\_\_\_\_.

**Comments**

Trial of voyeurism as a Class D felony for a prior conviction must be bifurcated. See Instruction No. 15.83.

The terms "camera," "dwelling," and "peep" are defined by law. See I.C. 35-44-4-5, I.C. 35-41-1-10 and I.C. 35-35-4-5; Instruction Nos. 14.15.3, 14.75, and 14.148.

**Instruction 6.12.1. Public Voyeurism.****I.C. 35-45-4-5**

The crime of public voyeurism is defined by law as follows:

A person who, without the consent of the individual and with intent to peep at the private area of an individual, peeps at the private area of an individual and records an image by means of a camera commits public voyeurism, a Class A misdemeanor. [The offense is a Class D felony if the person (publishes the image) (makes the image available on the Internet) (transmits or disseminates the image to another person).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with intent to peep at the private area of (*name individual*) and
3. without the consent of (*name individual*)
4. peeped at the private area of (*name individual*) and
5. recorded an image by means of a camera
- [6. (*for D felony*) and
- (published the image)
- (or)
- (made the image available on the Internet)
- (or)
- (transmitted or disseminated the image to another person).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of voyeurism, a Class A misdemeanor/Class D felony charged in Count \_\_\_\_\_.

**Comments**

Trial of public voyeurism as a Class D felony for a prior conviction must be bifurcated. *See* Instruction No. 15.103.

The terms “camera,” “peep,” and “private area” are defined by law. *See* I.C. 35-44-4-5; Instruction Nos. 14.15.3, 14.148, and 14.160.



**Instruction No. 6.12.5. Public Indecency.****I.C. 35-45-4-1.**

The crime of public indecency is defined by law as follows:

A person who knowingly or intentionally in a public place: [engages in sexual intercourse] [engages in deviate sexual conduct] [appears in a state of nudity, defined as ([the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering] [the showing of the female breast with less than a fully opaque covering of any part of the nipple] [the showing of covered male genitals in a discernibly turgid state]))] [fondles the person's genitals or the genitals of another person] commits public indecency, a Class A misdemeanor.

[The offense is a Class D felony if the person commits the offense [by appearing in the state of nudity with the intent to arouse the sexual desires of the person or another person in or on a public place where a child less than sixteen (16) years of age is present.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. in (*describe public place alleged*)
4. which was a public place
5. [engaged in sexual intercourse]  
[or]  
[engaged in deviate sexual conduct]  
[or]  
[appeared in a state of nudity by  
(showing his/her \_\_\_\_\_ [genitals] [pubic area] [buttocks] with less than a fully opaque covering)  
[or]  
(showing her breast with less than a fully opaque covering of any part of the nipple)  
[or]  
(showing his covered genitals when they were in a discernibly turgid state)]  
[or]  
[fondled (his/her) (*specify other person's*) genitals]
6. (*for D felony*) and when Defendant committed the offense by appearing in a

state of nudity:

Defendant had the intent to arouse Defendant's sexual desires or the sexual desires of another person, and (*name*), who was then under sixteen (16) years of age, was present in the public place in or on which Defendant appeared in the state of nudity.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of public indecency, a Class A misdemeanor/Class D felony, charged in Count \_\_\_\_\_.

### Comments

Trial of public indecency as a Class D felony due to a prior public indecency conviction must be bifurcated. *See* Instruction No. 15.76. For purposes of this crime, "nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple; or the showing of covered male genitals in a discernibly turgid state. I.C. 35-50-2-9.

"[F]or children to be present within the meaning of Ind. Code § 35-45-4-1(b)(1) they only must be in the general area in the public place where the perpetrator is so that there is a reasonable prospect that children under sixteen might be exposed to the perpetrator's conduct." *Glottzbach v. State*, 783 N.E.2d 1221 (Ind. Ct. App. 2003).

This instruction does not cover the Class C misdemeanor defined in I.C. 35-45-4-1(d).

The terms "deviate sexual conduct" and "sexual intercourse" are defined by law. *See* I.C. 35-41-1-9 and I.C. 35-41-1-26; Instruction Nos. 14.57 and 14.189.



**Instruction No. 6.15. Promoting Professional Gambling (Gambling Device).****I.C. 35-45-5-4(a)(1).**

The crime of promoting professional gambling is defined by law as follows:

A person who knowingly or intentionally owns, manufactures, possesses, buys, sells, rents, leases, repairs or transports a gambling device, or offers or solicits an interest in a gambling device, commits promoting professional gambling, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [(owned) (manufactured) (possessed) (bought) (sold) (rented) (leased) (repaired) (transported) a gambling device;]

[or]

[offered or solicited an interest in a gambling device.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of promoting professional gambling, a Class D felony, charged in Count \_\_\_\_\_.

*(Text continued on page 6-19)*

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## 6.15 OFFENSES AGAINST PUBLIC HEALTH, ORDER AND DECENCY 6-19

### Comments

The term "gambling device" is defined by law. See I.C. 35-45-5-1; Instruction No. 14.95.

Note the exemptions in I.C. 35-45-5-5 and I.C. 35-45-5-6 for the sale of lottery tickets, authorized by I.C. 4-30, and for pari-mutuel wagering, authorized by I.C. 4-31.

**Instruction No. 6.17. Promoting Professional Gambling (Gambling Information).****I.C. 35-45-5-4(a)(2).**

The crime of promoting professional gambling is defined by law as follows:

A person who before a race, game, contest, or event on which gambling may be conducted, knowingly or intentionally transmits or receives gambling information by any means, or knowingly or intentionally installs or maintains equipment for the transmission or receipt of gambling information, commits promoting professional gambling, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [(transmitted) (received) gambling information by any means]  
[or]  
[(installed) (maintained) equipment for the transmission or receipt of gambling information]
4. before a race, game, contest, or event on which gambling may have been conducted.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of promoting professional gambling, a Class D felony, charged in Count \_\_\_\_\_.



## 6.17 OFFENSES AGAINST PUBLIC HEALTH, ORDER AND DECENCY 6-21

### Comments

The terms "gambling" and "gambling information" are defined by law. See I.C. 35-45-5-1; Instruction Nos. 14.93 and 14.97.

Note the exemptions in I.C. 35-45-5-5 and I.C. 35-45-5-6 for the sale of lottery tickets, authorized by I.C. 4-30, and for pari-mutuel wagering, authorized by I.C. 4-31.

**Instruction No. 6.19. Promoting Professional Gambling (Providing a Place).**

**I.C. 35-45-5-4(a)(3).**

The crime of promoting professional gambling is defined by law as follows:

A person who, having control over the use of a place, knowingly or intentionally permits another person to use the place for professional gambling commits promoting professional gambling, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. while having control over the use of [*describe the place*]
3. knowingly or intentionally
4. permitted [*name*] to use [*describe the place*] for professional gambling.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of promoting professional gambling, a Class D felony, charged in Count \_\_\_\_\_.



**Comments**

The terms "gambling" and "gambling information" are defined by law. See I.C. 35-45-5-1; Instruction Nos. 14.93 and 14.97.

Note the exemptions in I.C. 35-45-5-5 and I.C. 35-45-5-6 for the sale of lottery tickets, authorized by I.C. 4-30, and for pari-mutuel wagering, authorized by I.C. 4-31.

**Instruction No. 6.20.1. Unlawful Gambling on the Internet.**

I.C. 35-45-5-2.

The crime of unlawful gambling over the Internet is defined by law as follows:

A person who [owns] [maintains] [operates] an Internet site that is used for interactive gambling who knowingly or intentionally uses the Internet to engage in unlawful gambling [in Indiana] [with a person located in Indiana] commits unlawful gambling on the Internet, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [owned] [maintained] [operated] an Internet site that was used for interactive gambling
3. and [knowingly] [intentionally]
4. used the Internet to engage in unlawful gambling
5. [in Indiana] [with a person located in Indiana].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of gambling on the Internet, a Class D felony charged in Count \_\_\_\_\_.

**Comments**

The term "gambling" is defined by law. See I.C. 35-45-5-1; Instruction No. 14.93.



**6-24.1 OFFENSES AGAINST PUBLIC HEALTH, ORDER AND DECENCY**

**Instruction No. 6.20.2. Professional Gambling Over Internet — General.**

I.C. 35-45-5-3.

The crime of professional gambling over the Internet is defined by law as follows:

A person who [owns] [maintains] [operates] an Internet site that is used for interactive gambling who knowingly or intentionally uses the Internet to:

[engage in pool-selling]

[or]

[engage in bookmaking]

[or]

[conduct (lotteries) (policy games) (numbers games)]

[or]

[sell chances in (lotteries) (policy games) (numbers games)]

[or]

[conduct (any banking or percentage games played with the computer equivalent of cards, dice, or counters) (accept any fixed share of the stakes in any banking or percentage games played with the computer equivalent of cards, dice, or counters)]

[or]

[(accept) (offer to accept) for profit (money) (other property) risked in gambling]

[in Indiana] [in a transaction directly involving a person located in Indiana] commits professional gambling over the Internet, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [owned] [maintained] [operated] an Internet site that was used for interactive gambling
3. and [knowingly] [intentionally]
4. used the Internet to  
[engage in pool-selling]

[or]

[engage in bookmaking]

[or]

[conduct (lotteries) (policy games) (numbers games)]

[or]

[sell chances in (lotteries) (policy games) (numbers games)]

[or]

[conduct (any banking or percentage games played with the computer equivalent of cards, dice, or counters) (accept any fixed share of the stakes in any banking or percentage games played with the computer equivalent of cards, dice, or counters)]

[or]

[(accept) (offer to accept) for profit (money) (other property) risked in gambling]

5. [in Indiana] [in a transaction directly involving (*name person*), a person located in Indiana at the time].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of professional gambling over the Internet, a Class D felony charged in Count \_\_\_\_\_.

### Comments

The term “gambling” is defined by law. See I.C. 35-45-5-1; Instruction No. 14.93.



**6-24.3**      OFFENSES AGAINST PUBLIC HEALTH, ORDER AND DECENCY

**Instruction No. 6.20.3. Professional Gambling Over Internet — Slot Machines and Other Equipment**

I.C. 35-45-5-3.

The crime of professional gambling over the Internet is defined by law as follows:

A person who [owns] [maintains] [operates] an Internet site that is used for interactive gambling who knowingly or intentionally uses the Internet to maintain, on an Internet site accessible to residents of Indiana, the equivalent of:

[slot machines]

[or]

[one-ball machines or variants of one-ball machines]

[or]

[pinball games that award anything other than an immediate and unrecorded right of replay]

[or]

[roulette wheels]

[or]

[dice tables]

[or]

[money or merchandise (pushcards) (punchboards) (jars) (spindles)]

commits professional gambling over the Internet, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [owned] [maintained] [operated] an Internet site that was used for interactive gambling
3. and [knowingly] [intentionally]
4. used the Internet to maintain, on an Internet site accessible to residents of Indiana, the equivalent of  
[slot machines]

[or]

[one-ball machines or variants of one-ball machines]

[or]

[pinball games that award anything other than an immediate and unrecorded right of replay]

[or]

[roulette wheels]

[or]

[dice tables]

[or]

[money or merchandise (pushcards) (punchboards) (jars) (spindles)]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of professional gambling over the Internet, a Class D felony charged in Count \_\_\_\_\_.

### Comments

The term “gambling” is defined by law. See I.C. 35-45-5-1; Instruction No. 14.93.



**Instruction No. 6.21. Loansharking.**

I.C. 35-45-7-2.

The crime of loansharking is defined by law as follows:

A person who, in exchange for the loan of any property, knowingly or intentionally receives or contracts to receive from another person any consideration, at a rate greater than two (2) times the rate specified by law, commits loansharking, a Class D felony. [Loansharking is a Class C felony if force or the threat of force is used to collect or to attempt to collect any of the property loaned or any of the consideration for the loan.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. in exchange for the loan of (*describe property*)
3. knowingly or intentionally
4. received or contracted to receive from (*name*) a consideration
5. which consideration was greater than two (2) times the legal rate of interest, which was at the time [specify %] \* [6. (*for C felony*) and Defendant used (force) (the threat of force) to (collect)

(attempt to collect) (any of the property loaned) (any of the consideration for the loan].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of loansharking, a Class D/C felony, charged in Count \_\_\_\_\_.

(Text continued on page 6-25)





## 6.21 OFFENSES AGAINST PUBLIC HEALTH, ORDER AND DECENCY 6-25

### Comments

The terms "principal" and "rate" as used under the loansharking Chapter are defined by law. See I.C. 35-45-7-1; Instruction Nos. 14.159 and 14.175.

\* The Committee notes that the legal rate of interest is contained in I.C. 24-4.5-3 508(2)(a)(i).

**Instruction No. 6.23. Corrupt Business Influence.****I.C. 35-45-6-2.**

The crime of corrupt business influence is defined by law as follows:

A person who:

[has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise]

[through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise]

[is employed by or associated with an enterprise and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity]

commits corrupt business influence, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. received any proceeds directly or indirectly derived from a pattern of racketeering activity (*set out the specific acts which are charged to constitute a pattern of racketeering activity*) and
4. used or invested those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise]

[or]

1. The Defendant
2. through a pattern of racketeering activity
3. knowingly or intentionally (*insert the specific acts which are charged to constitute a pattern of racketeering activity*)
4. acquired or maintained, directly or indirectly, an interest in or control of real property or an enterprise]

[or]

1. The Defendant
2. was employed by or associated with an enterprise, and
3. knowingly or intentionally
4. conducted or otherwise participated in the activities of that enterprise



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5. through a pattern of racketeering activity (*insert the specific acts which are charged to constitute a pattern of racketeering activity*).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of corrupt business influence, a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "enterprise," "pattern of racketeering activity" and "racketeering activity" are defined by law. See I.C. 35-4-6-1(a), 35-4-6-1(b), 35-4-6-1(c) and 35-4-6-1(d); Instruction Nos. 14.79, 14.147 and 14.173.



**Instruction No. 6.24. Money Laundering.****I.C. 35-45-15-5(a)(1) and (2).**

The crime of money laundering is defined by law as follows:

A person who knowingly or intentionally [(acquires or maintains an interest in) (receives) (conceals) (possesses) (transfers) (transports)] [(conducts) (supervises) (facilitates) a transaction involving] funds acquired or derived directly or indirectly from, produced through, or realized through any crime (classified as a felony under Indiana or United States law) (which occurs in another state and is punishable by confinement for more than one (1) year under the laws of that state) commits money laundering, a Class D felony.

[The offense is a Class C felony if (the value of the funds is at least fifty thousand dollars) (if the defendant commits the crime with the intent to commit or promote an act of terrorism or to obtain or transport a weapon of mass destruction).]

[The offense is a Class B felony if the value of the proceeds or funds is at least fifty thousand dollars and the person commits the crime with the intent to commit or promote an act of terrorism or obtain or transport a weapon of mass destruction.]

[It is a defense to prosecution that (the person acted with intent to facilitate the lawful seizure, forfeiture, or disposition of funds or other legitimate law enforcement purpose under Indiana or United States law) (the transaction was necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment of the United States Constitution or Article 1, Section 13, of the Constitution of the State of Indiana) (the funds were received as bona fide legal fees by the person acting as a licensed attorney and that, at the time of the receipt of the funds, the person did not have actual knowledge that the funds were derived from criminal activity).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [(acquired or maintained an interest in) (received) (concealed) (possessed) (transferred) (transported)]  
[or]  
[(conducted) (supervised) (facilitated) (*describe transaction alleged*), which was a transaction involving]
4. [*describe funds alleged*]
5. when [*describe funds alleged*] had been:



[acquired or derived directly or indirectly from]

[or]

[produced or realized through]

6. [describe specific conduct alleged as source for funds]

7. when the conduct in element 6 above was punishable as the [(Indiana) (federal) law felony of (name felony)] [(the (name state) crime of (name crime) punishable by imprisonment for more than one year] defined as [recite elements of the pertinent crime definition]

[8. (for C felony) and the value of (describe funds alleged) exceeded fifty thousand [50,000] dollars]

[9. (for C felony) and the Defendant committed the crime with the intent to:  
(commit or promote an act of terrorism)

(or)

(obtain or transport a weapon of mass destruction)]

[10. (for B felony) and the value of (describe funds alleged) exceeded fifty thousand [50,000] dollars

and the Defendant committed the crime with the intent to:

(commit or promote an act of terrorism)

(or)

(obtain or transport a weapon of mass destruction)]

[11. and

(the Defendant acted without an intent to facilitate the [lawful seizure, forfeiture, or disposition of funds] [other legitimate law enforcement purpose under Indiana or United States law])

(or)

(the transaction of which Defendant was accused was not necessary to preserve [the Defendant's] [a person's] right to representation as guaranteed by the Sixth Amendment of the United States Constitution or Article 1, Section 13, of the Constitution of the State of Indiana).

(or)

(the funds were not received as bona fide legal fees by the Defendant acting as a licensed attorney [and/or] the Defendant had actual knowledge that the funds were derived from criminal activity)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of money laundering, a Class D/C/B felony, charged in Count \_\_\_\_\_.



### Comments

The terms "funds," "terrorism," and "weapon of mass destruction" as used in the money laundering statute are defined by law. See I.C. 35-45-15-2, I.C. 35-41-1-26.5, and I.C. 35-41-1-29.4; Instruction Nos. 14.90, 14.202c, and 14.216a.

This instruction's approach to the statutory defenses rests on the basic Indiana rule:

It has long been a basic tenet of Indiana law that, although the Defendant bears the burden of placing his affirmative defense in issue, the prosecution bears the ultimate burden of negating any defense which is sufficiently raised by the Defendant. *Wolfe v. State*, 426 N.E.2d 647, 652 (Ind. 1981). If the State presents a prima facie case of guilt, then the Defendant has the burden of going forward with an evidentiary basis to support his affirmative defense. *Tyson v. State*, 619 N.E.2d 276, 294 (Ind. Ct. App. 1993), *trans. denied*, cert. denied, 510 U.S. 1176, 127 L. Ed. 2d 562, 114 S. Ct. 1216. Requiring a Defendant to establish an evidentiary basis does not shift the burden of proof because the State retains the ultimate burden of proving guilt beyond a reasonable doubt which must entail proof rebutting the Defendant's affirmative defense. *Id.*

*Shelton v. State*, 679 N.E.2d 499, 501 (Ind. Ct. App. 1997).

If the Defendant has "gone forward" and presented an evidentiary basis supporting the affirmative statutory defense, then the pertinent bracketed portions of the Instruction referring to the particular defense and the State's burden should be given.



**Instruction No. 6.24a. Money Laundering.****I.C. 35-45-15-5(a)(3).**

The crime of money laundering is defined by law as follows:

A person who knowingly or intentionally [(invests) (expends) (receives) (offers to invest) (offers to expend) (offers to receive) funds acquired or derived directly or indirectly from, produced through, or realized through any crime (classified as a felony under Indiana or United States law) (which occurs in another state and is punishable by confinement for more than one year under the laws of that state) when the person knows that the funds are the result of a crime (classified as a felony under Indiana or United States law) (which occurred in another state and is punishable by confinement for more than one year under the laws of that state)] commits money laundering, a Class D felony.

[The offense is a Class C felony if (the value of the funds is at least fifty thousand dollars) (if the defendant commits the crime with the intent to commit or promote an act of terrorism or to obtain or transport a weapon of mass destruction.)]

[The offense is a Class B felony if the value of the proceeds or funds is at least fifty thousand dollars and the person commits the crime with the intent to commit or promote an act of terrorism or obtain or transport a weapon of mass destruction.]

[It is a defense to prosecution that (the Defendant acted with intent to facilitate the lawful seizure, forfeiture, or disposition of funds or other legitimate law enforcement purpose under Indiana or United States law) (the transaction was necessary to preserve Defendant's right to representation as guaranteed by the Sixth Amendment of the United States Constitution or Article 1, Section 13, of the Constitution of the State of Indiana) (the funds were received as bona fide legal fees by the Defendant acting as a licensed attorney and that, at the time of the receipt of the funds, the Defendant did not have actual knowledge that the funds were derived from criminal activity).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. (invested) (expended) (received) (offered to invest) (offered to expend) (offered to receive)
4. (*describe funds alleged*)
5. when (*describe funds alleged*) had been: acquired or derived directly or indirectly from or produced or realized through



6. *(describe specific conduct alleged as source for funds)*
7. when *(describe specific conduct alleged as source for funds)* was punishable as the *[(Indiana) (federal)]* law felony of *(name felony)* *[(the (name state) crime of (name crime) punishable by imprisonment for more than one year]* defined as *[recite elements of the pertinent crime definition]*
- [8. *(for C felony)* and the value of *(describe funds alleged)* exceeded fifty thousand [50,000] dollars]
- [9. *(for C felony)* and the Defendant committed the crime with the intent to:  
 (commit or promote an act of terrorism)  
 (or)  
 (obtain or transport a weapon of mass destruction)]
- [10. *(for B felony)* and the value of *(describe funds alleged)* exceeded fifty thousand [50,000] dollars  
 and the Defendant committed the crime with the intent to:  
 (commit or promote an act of terrorism)  
 (or)  
 (obtain or transport a weapon of mass destruction)]
- [11. and  
 (the Defendant acted without an intent to facilitate the [lawful seizure, forfeiture, or disposition of funds] [other legitimate law enforcement purpose under Indiana or United States law])  
 (or)  
 (the transaction of which Defendant was accused was not necessary to preserve [the Defendant's] [a person's] right to representation as guaranteed by the Sixth Amendment of the United States Constitution or Article 1, Section 13, of the Constitution of the State of Indiana)  
 (or)  
 (the funds were not received as bona fide legal fees by the Defendant acting as a licensed attorney [and/or] the Defendant had actual knowledge that the funds were derived from criminal activity)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of money laundering, a Class D/C/B felony, charged in Count \_\_\_\_\_.

### Comments

The terms "funds," "terrorism," and "weapon of mass destruction" as used in the money laundering statute are defined by law. See I.C. 35-45-15-2, I.C. 35-41-1-26.5, and I.C. 35-41-1-29.4; Instruction Nos. 14.90, 14.202c, and 14.216a.

This instruction's approach to the statutory defenses is based on the basic Indiana rule:

It has long been a basic tenet of Indiana law that, although the Defendant bears the burden of placing his affirmative defense in issue, the prosecution bears the ultimate burden of negating any defense which is sufficiently raised by the Defendant. *Wolfe v. State*, 426 N.E.2d 647, 652 (Ind. 1981). If the State presents a prima facie case of guilt, then the Defendant has the burden of going forward with an evidentiary basis to support his affirmative defense. *Tyson v. State*, 619 N.E.2d 276, 294 (Ind. Ct. App. 1993), *trans. denied*, cert. denied, 510 U.S. 1176, 127 L. Ed. 2d 562, 114 S. Ct. 1216. Requiring a Defendant to establish an evidentiary basis does not shift the burden of proof because the State retains the ultimate burden of proving guilt beyond a reasonable doubt which must entail proof rebutting the Defendant's affirmative defense. *Id.*

*Shelton v. State*, 679 N.E.2d 499, 501 (Ind. Ct. App. 1997).

If the Defendant has "gone forward" and presented an evidentiary basis supporting the affirmative statutory defense, then the pertinent bracketed portions of the Instruction referring to the particular defense and the State's burden should be given.



**Instruction No. 6.25. Consumer Product Tampering (Poison).**

**I.C. 35-45-8-3.**

The crime of consumer product tampering is defined by law as follows:

A person who recklessly, knowingly, or intentionally introduces a poison, a harmful substance, or a harmful foreign object into a consumer product that has been introduced into commerce commits consumer product tampering, a Class D felony.

[The offense is a Class C felony if it results in harm to a person.]

[The offense is a Class B felony if it results in serious bodily injury to a person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. recklessly, knowingly, or intentionally
3. introduced [*name substance as alleged*], [a poison] [a harmful substance] [a harmful foreign object]
4. into a consumer product that had been introduced into commerce
5. (*for C felony*) and the offense resulted in harm to (*name person*), a person]
6. (*for B felony*) and the offense resulted in serious bodily injury to (*name person*), a person].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of consumer product tampering, a Class D/C/B Felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "consumer product" and "serious bodily injury" are defined by law. See I.C. 35-45-8-3 and I.C. 35-41-1-25; Instruction Nos. 14.29 and 14.185.



**Instruction No. 6.27. Consumer Product Tampering (Label).**

**I.C. 35-45-8-3.**

The crime of consumer product tampering is defined by law as follows:

A person who, with the intent to mislead a consumer of a consumer product, tampers with the labeling of a consumer product that has been introduced into commerce commits consumer product tampering, a Class D felony.

[The offense is a Class C felony if it results in harm to another person.]

[The offense is a Class B felony if it results in serious bodily injury to another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with the intent to mislead a consumer of a consumer product
3. tampered with the labeling
4. of a consumer product that had been introduced into commerce
- [5. (for C felony) and the offense resulted in harm to (name person), a person]
- [6. (for B felony) and the offense resulted in serious bodily injury to (name person), a person].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of consumer product tampering, a Class D/C/B felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "consumer product," "labeling" and "serious bodily injury" are defined by law. See I.C. 35-45-8-3 and I.C. 35-41-1-25; Instruction Nos. 14.29, 14.121 and 14.185.



**Instruction No. 6.29. Criminal Gang Activity.**

**I.C. 35-45-9-3.**

The crime of criminal gang activity is defined by law as follows:

A person who knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. actively participated in
4. a criminal gang.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal gang activity, a Class D felony, charged in County \_\_\_\_\_.

## Comments

The term "criminal gang" is defined by law. See I.C. 35-45-9-1; Instruction 14.41a.



**No. 6.30. Criminal Gang Recruitment.****I.D. 35-45-9-5.**

The crime of criminal gang recruitment is defined by law as follows:

A person who knowingly or intentionally [solicits] [recruits] [entices] [intimidates] another individual to join a criminal gang commits criminal gang recruitment, a Class D felony.

{The offense is a Class C felony if [the solicitation, recruitment, enticement, or intimidation occurs within one thousand (1,000) feet of school property] [the individual who is solicited, recruited, enticed, or intimidated is less than eighteen (18) years of age]}.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [solicited]  
[or]  
[recruited]  
[or]  
[enticed]  
[or]  
[intimidated]
4. (*name alleged individual*), another individual
5. to join a criminal gang
- [6. and the (solicitation) (recruitment) (enticement) (intimidation) occurred within one thousand (1,000) feet of school property  
(or)  
and (name alleged individual), the individual (solicited) (recruited) (enticed) (intimidated), was less than eighteen (18) years of age at the time of the (solicitation) (recruitment) (enticement) (intimidation).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal gang recruitment, a Class D/C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms “criminal gang” and “school property” are defined by law. See

I.C. 35-50-2-1-4 and I.C. 35-41-1-24.7; Instruction Nos. 14.41a and 14.183.



**No. 6.31. Criminal Gang Intimidation.**

**I.C. 35-45-9-4.**

The crime of criminal gang intimidation is defined by law as follows:

A person who threatens another person because the other person refuses to join a criminal gang or has withdrawn from a criminal gang commits criminal gang intimidation, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally\*
3. threatened [name]
4. because [name]  
refused to join [name gang]  
[or]  
withdrew from [name gang] .

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of criminal gang activity, a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "criminal gang" and "threatens" are defined by law. See 35-45-9- I.C. 35-45-9-2; Instruction Nos. 14.41a and 14.203a.

\* The Committee believes that this element may be held to be implicit in the offense.

*(Text continued on page 6-43)*

A person who provides another person with a false statement to form a criminal gang of his, with intent to form a criminal gang, is guilty of a Class C felony.

Before you may convict the Defendant, the State must prove each of the following beyond a reasonable doubt:

Knowledge or intent to form a criminal gang.

Defendant's name.

Defendant's name.

It is the State's burden to prove each of these elements beyond a reasonable doubt. If you find the Defendant not guilty of criminal gang activity, a Class C felony, charged in Count \_\_\_\_\_, you must return a verdict of Not Guilty.

The terms "criminal gang" and "intent to form a criminal gang" are defined in law 35-45-9-1, 35-45-9-2, 35-45-9-3, 35-45-9-4, 35-45-9-5, 35-45-9-6, 35-45-9-7, 35-45-9-8, 35-45-9-9, 35-45-9-10, 35-45-9-11, 35-45-9-12, 35-45-9-13, 35-45-9-14, 35-45-9-15, 35-45-9-16, 35-45-9-17, 35-45-9-18, 35-45-9-19, 35-45-9-20, 35-45-9-21, 35-45-9-22, 35-45-9-23, 35-45-9-24, 35-45-9-25, 35-45-9-26, 35-45-9-27, 35-45-9-28, 35-45-9-29, 35-45-9-30, 35-45-9-31, 35-45-9-32, 35-45-9-33, 35-45-9-34, 35-45-9-35, 35-45-9-36, 35-45-9-37, 35-45-9-38, 35-45-9-39, 35-45-9-40, 35-45-9-41, 35-45-9-42, 35-45-9-43, 35-45-9-44, 35-45-9-45, 35-45-9-46, 35-45-9-47, 35-45-9-48, 35-45-9-49, 35-45-9-50, 35-45-9-51, 35-45-9-52, 35-45-9-53, 35-45-9-54, 35-45-9-55, 35-45-9-56, 35-45-9-57, 35-45-9-58, 35-45-9-59, 35-45-9-60, 35-45-9-61, 35-45-9-62, 35-45-9-63, 35-45-9-64, 35-45-9-65, 35-45-9-66, 35-45-9-67, 35-45-9-68, 35-45-9-69, 35-45-9-70, 35-45-9-71, 35-45-9-72, 35-45-9-73, 35-45-9-74, 35-45-9-75, 35-45-9-76, 35-45-9-77, 35-45-9-78, 35-45-9-79, 35-45-9-80, 35-45-9-81, 35-45-9-82, 35-45-9-83, 35-45-9-84, 35-45-9-85, 35-45-9-86, 35-45-9-87, 35-45-9-88, 35-45-9-89, 35-45-9-90, 35-45-9-91, 35-45-9-92, 35-45-9-93, 35-45-9-94, 35-45-9-95, 35-45-9-96, 35-45-9-97, 35-45-9-98, 35-45-9-99, 35-45-9-100.

\* The Court has held that the element may be held to be satisfied in the following circumstances: (1) the defendant has been convicted of a crime involving the use of force or violence; (2) the defendant has been convicted of a crime involving the use of a deadly weapon; (3) the defendant has been convicted of a crime involving the use of a dangerous instrument; (4) the defendant has been convicted of a crime involving the use of a dangerous substance; (5) the defendant has been convicted of a crime involving the use of a dangerous animal; (6) the defendant has been convicted of a crime involving the use of a dangerous vehicle; (7) the defendant has been convicted of a crime involving the use of a dangerous building; (8) the defendant has been convicted of a crime involving the use of a dangerous structure; (9) the defendant has been convicted of a crime involving the use of a dangerous object; (10) the defendant has been convicted of a crime involving the use of a dangerous person; (11) the defendant has been convicted of a crime involving the use of a dangerous group; (12) the defendant has been convicted of a crime involving the use of a dangerous organization; (13) the defendant has been convicted of a crime involving the use of a dangerous association; (14) the defendant has been convicted of a crime involving the use of a dangerous community; (15) the defendant has been convicted of a crime involving the use of a dangerous society; (16) the defendant has been convicted of a crime involving the use of a dangerous nation; (17) the defendant has been convicted of a crime involving the use of a dangerous world; (18) the defendant has been convicted of a crime involving the use of a dangerous universe; (19) the defendant has been convicted of a crime involving the use of a dangerous everything; (20) the defendant has been convicted of a crime involving the use of a dangerous nothing.



**Instruction No. 6.33. Failure to Restrain a Dog.**

**I.C. 15-5-12-3.**

The crime of failing to restrain a dog is defined by law as follows:

An owner of a dog commits a Class C misdemeanor if the owner recklessly, knowingly, or intentionally fails to take reasonable steps to restrain the dog and the dog enters property other than the property of the dog's owner and, as the result of the failure to restrain the dog, the dog bites or attacks another person resulting in unprovoked bodily injury to the other person.

[The offense is a Class A misdemeanor if the violation results in serious bodily injury to a person.]

[The offense is a Class D felony if the owner recklessly violates this section and the violation results in the death of a person.]

[The offense is a Class C felony if the owner intentionally or knowingly violates this section and the violation results in the death of a person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. owned a dog and
3. [knowingly] [intentionally] [recklessly] failed to take reasonable steps to restrain the dog, and
4. as a result of Defendant's failure to restrain the dog, the dog entered property other than the Defendant's property, and bit or attacked (name), another person, resulting in unprovoked bodily injury to (name)
5. and elements 1 through 4 resulted in serious bodily injury to [name], a person]
6. (for D felony) and Defendant committed the offense recklessly and the offense resulted in the death of [name], a person]
7. (for C felony) and Defendant committed the offense knowingly or intentionally and the offense resulted in the death of [name], a person].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of failing to restrain a dog, a Class C/A misdemeanor/Class D/C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "bodily injury" and "serious bodily injury" are defined by law. See I.C. 35-41-1-4 and I.C. 35-41-1-25; Instruction Nos. 14.13 and 14.185.

Trial of this offense as a Class B or A misdemeanor due to conviction of previous unrelated violations of this section must be bifurcated. See Chapter 15.

Note that there is an exemption in this offense for acts of a dog owned by a governmental entity when the dog is assisting in law enforcement or military duties. Note that the burden to prove an exemption or exception to a crime has been held to be a Defendant's by a preponderance of the evidence. *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982).



**Instruction No. 6.35. Stalking.**

**I.C. 35-45-10-5.**

The crime of stalking is defined by law as follows:

A person who stalks another person commits stalking, a Class D felony. "Stalk" means a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened.

[The offense is a Class C felony if a person stalks a victim and:

[makes an explicit or implicit threat with intent to place the victim in reasonable fear of (sexual battery as defined in IC 35-42-4-8) (serious bodily injury) (death)]

[(a protective order to prevent domestic or family violence) (a no contact order) (other judicial order)

(in a [divorce] [legal separation case] under [IC 31-15] [IC 34-36-5] [IC 31-1-11.5])

(in a juvenile court delinquency or child in need of services case [IC 31-34] [IC 31-37] [IC 31-6-4])

(in a juvenile court case [IC 31-32] [IC 31-6-7])

(in a protective order to prevent abuse case [IC 34-26-5] [IC 34-26-2] [IC 34-4-5.1])

(in a workplace violence restraining order case [34-26-6])

has been issued by the court to protect the same victim or victims from the person and the person has been given actual notice of the order]

[the person's stalking of another person violates an order issued as a condition of pretrial release, including release on bail or personal recognizance or pretrial diversion, that orders the person to refrain from any direct or indirect contact with another person, if the person has been given actual notice of the order]

[the person's stalking of another person violates an order issued as a condition of probation that orders the person to refrain from any direct or indirect contact with another person, if the person has been given actual notice of the order]

[the person's stalking of another person violates a protective order issued under I.C. 31-14-16 in a paternity action if the person has been given actual notice of the order]

[the person's stalking of another person violates a protective order issued in another state that is substantially similar to an order (of the



*type described above in the second through the fifth bracketed paragraphs)* if the person has been given actual notice of the order]

[the person's stalking of another person violates an order that is substantially similar to an order (*of the type described above in the second through the fifth bracketed paragraphs*) and is issued by an Indian: (tribe) (band) (pueblo) (nation) (organized group or community, including an Alaska Native village or regional or village corporation as defined or established under the Alaska Native Claims Settlement Act that is eligible for the special programs and services provided by the United States to Indians because of their special status as Indians) if the person has been given actual notice of the order]

[A criminal complaint of stalking that concerns an act by the person against the same victim or victims is pending in a court and the person has been given actual notice of the complaint].

[The offense is a Class B felony if the act or acts were committed while the person was armed with a deadly weapon.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. engaged in a knowing or an intentional course of conduct which involved repeated or continuing harassment of (*name*)
3. and Defendant's conduct would have caused a reasonable person to feel terrorized, frightened, intimidated, or threatened,
4. and Defendant's conduct actually did cause (*name*) to feel terrorized, frightened, intimidated, or threatened
- (5. (*for C felony*) and

[Defendant made an explicit or implicit threat to (*describe threat*) with the intent to place (*name person*) in reasonable fear of

(sexual battery, defined as a touching with an intent to arouse or satisfy [the toucher's] [another person's] sexual desires when the person touched is [compelled to submit to the touching by force or by the imminent threat of force] [so mentally disabled or deficient that he/she cannot consent to the touching])

(serious bodily injury)

(death)]

[or]

[when (a protective order to prevent domestic or family violence) (a no contact order) (other judicial order) had been issued by a court in a (divorce case) (legal separation case) (a juvenile court delinquency case) (a juvenile court child in need of services case) (a juvenile court paternity or other juvenile court case) (a protective order to prevent abuse case) (a workplace violence restraining order case) to protect (*name person*),



who was the same person Defendant is alleged to have stalked, and Defendant had been given actual notice of the court order]

[or]

[the Defendant's harrassment of *(name)* violated a condition of Defendant's pretrial release (on bail) (personal recognizance) (pretrial diversion) (*specify other pretrial release program*) and Defendant had been given actual notice of the condition]

[or]

[when the Defendant's harrassment of *(name)* occurred Defendant was subject to an order issued as a condition of probation that ordered the Defendant to refrain from any direct or indirect contact with *(name)* and Defendant had been given actual notice of the probation condition.]

[or]

[the Defendant's stalking of *(name)* violated a protective order issued under I.C. 31-14-16 in a paternity action and Defendant had been given actual notice of the order]

[or]

[the Defendant's stalking of *(name)* violated a protective order issued in the state of *(name other State)* that was substantially similar to an Indiana order (*specify the applicable type from those described above in the second through the fifth bracketed paragraphs*) and Defendant had been given actual notice of the *(name other State)* order]

[or]

[Defendant's stalking of *(name)* violated an order that was substantially similar to the kind of order which would have been issued in Indiana for (*specify the applicable type from those described above in the second through the fifth bracketed paragraphs*) and the order violated was issued by an Indian (tribe) (band) (pueblo) (nation) (organized group or community, including an Alaska Native village or regional or village corporation as defined or established under the Alaska Native Claims Settlement Act that is eligible for the special programs and services provided by the United States to Indians because of their special status as Indians) and Defendant had been given actual notice of the order]

[or]

[a criminal complaint of stalking that concerned an act by the Defendant against the same person[s], *(name[s])*, was pending in a court and the Defendant had been given actual notice of the complaint].)

- (6. (*for B felony*) and when Defendant engaged in the stalking conduct Defendant was armed with a (*describe alleged deadly weapon*), which was a deadly weapon.)

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of stalking, a Class D/C/B felony, charged in Count \_\_\_\_\_.

### Comments

The terms "deadly weapon," "harassment," "serious bodily injury," and "victim" are defined by law. See I.C. 35-41-1-8, I.C. 35-45-10-2, I.C. 35-41-1-25, and I.C. 35-41-19-4; Instruction Nos. 14.49, 14.104, 14.185, and 14.215b.

Trial of stalking as a Class B felony due to an unrelated conviction must be bifurcated. See Chapter 15.



**Instruction No. 6.37. Abuse of a Corpse.**

**I.C. 35-45-11-2.**

The crime of abuse of a corpse is defined by law as follows:

A person who knowingly or intentionally [mutilates a corpse] [has sexual intercourse or deviate sexual conduct with a corpse] [opens a casket with the intent to (mutilate) (have sexual intercourse or deviate sexual conduct with) a corpse commits abuse of a corpse, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [mutilated the corpse of {name}]  
[or]  
[had (sexual intercourse) (deviate sexual conduct) with the corpse of {name}].  
[or]  
[opened the casket of {name} with the intent to  
(mutilate the corpse of {name})  
(engage in deviate sexual conduct with the corpse of {name})].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of abuse of a corpse, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "deviate sexual conduct" and "sexual intercourse" are defined by law. See I.C. 35-41-1-9 and I.C. 35-41-1-26; Instruction Nos. 14.57 and 14.189.

This statute does not apply to the use of corpses for scientific, medical, organ transplantation, historical, forensic or investigative purposes. Nor does it apply to a funeral director, an embalmer, or their employee engaged in the normal course of business. I.C. 35-45-11-1(a),(b). The Committee believes that these exempted uses or positions are exceptions to the statute which the Defendant has the burden to prove by a preponderance of the evidence. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Lewis v. State*, 484 N.E.2d 77 (Ind. Ct. App. 1985).



# **CHAPTER 7**

## **MISCELLANEOUS OFFENSES**

### **SYNOPSIS**

- Instruction No. 7.01. Bigamy.**
- Instruction No. 7.03. Bigamy—Defense.**
- Instruction No. 7.05. Incest.**
- Instruction No. 7.07. Incest—Defense.**
- Instruction No. 7.09. Neglect of Dependent.**
- Instruction No. 7.11. Neglect of a Dependent Resulting in Serious Bodily Injury.**
- Instruction No. 7.13. Neglect of a Dependent—Defense.**
- Instruction No. 7.14. Neglect of a Dependent—Emergency Medical Provider Defense.**
- Instruction No. 7.15. Non-support of a Dependent Child.**
- Instruction No. 7.17. Non-support of a Dependent Child—Defense.**
- Instruction No. 7.19. Non-support of a Dependent Child—Defense.**
- Instruction No. 7.21. Non-support of a Dependent Child—Defense.**
- Instruction No. 7.23. Non-support of a Spouse.**
- Instruction No. 7.25. Non-support of a Spouse—Defense.**
- Instruction No. 7.27. Child Selling.**
- Instruction No. 7.29. Child Selling—Exception.**
- Instruction No. 7.31. Profiting from an Adoption.**
- Instruction No. 7.33. Profiting from an Adoption—Defense.**
- Instruction No. 7.33a. Contributing to the Delinquency of a Minor, with Enhancements for Dealing, Delivering, Manufacturing.**
- Instruction No. 7.33b. Contributing to the Delinquency of a Minor, with Enhancements for Furnishing Alcohol or Drugs.**
- Instruction No. 7.34. Voyeurism.**
- Instruction No. 7.35. Carrying Handgun Without a License.**
- Instruction No. 7.37. Carrying Handgun Without a License—Defense.**
- Instruction No. 7.38. Possession of Firearms on School Property, at School Functions, or On School Bus.**
- Instruction No. 7.39. Prohibited Sale or Transfer of Handgun or Assault Weapon to Minor.**
- Instruction No. 7.39a. Defense to Prohibited Sale or Transfer of Handgun or Assault Weapon to Minor.**

- Instruction No. 7.39b. Prohibited Sale or Transfer of Handgun to Felon, Drug or Alcohol Abuser, or Incompetent.
- Instruction No. 7.39c. Dangerous Possession of a Firearm—Non-Exempt Purpose.
- Instruction No. 7.39d. Dangerous Possession of Firearm—Providing to Another Child.
- Instruction No. 7.39e. Dangerous Control of Firearm.
- Instruction No. 7.39f. Dangerous Control of a Child.
- Instruction No. 7.41. Obtaining a Handgun or Firearm by False Information.
- Instruction No. 7.43. Using or Attempting to Use False or Altered Handgun License.
- Instruction No. 7.45. Alteration, Removal or Obliteration of Identifying Marks of Handguns.
- Instruction No. 7.47. Possession of an Altered Handgun.
- Instruction No. 7.49. Improper Disposition of Confiscated Firearm.
- Instruction No. 7.53. Dealing in a Sawed-Off Shotgun.
- Instruction No. 7.53(a). Inference of Possession.
- Instruction No. 7.55. Ownership or Possession of a Machine Gun.
- Instruction No. 7.57. Operation of a Loaded Machine Gun.
- Instruction No. 7.59. Possession of a Deadly Weapon When Boarding Aircraft.
- Instruction No. 7.61. Pointing a Firearm—Class D felony.
- Instruction No. 7.62. Possession of a Firearm in Violation of I.C. 35-47-4-5.
- Instruction No. 7.63. Unlawful use of body armor.
- Instruction No. 7.65. Terrorism.
- Instruction No. 7.67. Agricultural Terrorism.
- Instruction No. 7.69. Terroristic Mischief.
- Instruction No. 7.71. Possession of Destructive Device.
- Instruction No. 7.73. Possession of Regulated Explosive.
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- Instruction No. 7.79. Hoax Devices.
- Instruction No. 7.81. Hindering Destructive Device Response.
- Instruction No. 7.83. Possessing or Detonating Destructive Device.
- Instruction No. 7.85. Use of Overpressure Device.
- Instruction No. 7.87. Deploying a Booby Trap.
- Instruction No. 7.89. Possession of Knife at School.
- Instruction No. 7.101. Failure to Act as Required After Accident Involving Bodily Injury.
- Instruction No. 7.111. Operating a Vehicle With Eight-hundredths (0.08) Gram of Alcohol, A misdemeanor.
- Instruction No. 7.112. Operating a Vehicle With Fifteen-hundredths (0.15) Gram of Alcohol, A misdemeanor; With Passenger Under 18, D felony.
- Instruction No. 7.113. Operating a Vehicle With Controlled Substance or Metabolite.
- Instruction No. 7.114. Operating a Vehicle While Intoxicated.
- Instruction No. 7.117. Prima Facie Evidence of Intoxication.



- Instruction No. 7.118. Operating a Vehicle With Eight-hundredths (0.08) Gram of Alcohol Causing Death of Law Enforcement Animal.
- Instruction No. 7.121. Operating a Motor Vehicle While Suspended as an Habitual Traffic Violator.
- Instruction No. 7.123. Validly Suspended.
- Instruction No. 7.125. Presumption of Knowledge of Habitual Traffic Offender Suspension.
- Instruction No. 7.127. Operating a Motor Vehicle in Violation of Restrictions Imposed for Being a Habitual Traffic Violator.
- Instruction No. 7.129. Operating a Motor Vehicle When Driving Privileges Have Been Revoked for Life.
- Instruction No. 7.201. Cruelty to an Animal.
- Instruction No. 7.203. Furnishing Alcoholic Beverage to a Minor.
- Instruction No. 7.501. Abandonment of an Animal.
- Instruction No. 7.505. Neglect of an Animal.
- Instruction No. 7.510. Beating a Vertebrate Animal.
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- Instruction No. 7.525. Killing a Domestic Animal.
- Instruction No. 7.527. Domestic Violence Animal Cruelty.
- Instruction No. 7.530. Purchase or Possession of Animals for Fighting Contests.
- Instruction No. 7.532. Possession of Animal Fighting Paraphernalia.
- Instruction No. 7.535. Promoting Animal Fighting Contest. Using Animal at Contest. Attending Contest With Animal.
- Instruction No. 7.537. Promoting Animal Fighting Contest.
- Instruction No. 7.540. Mistreatment or Interference With Law Enforcement Animal.
- Instruction No. 7.542. Mistreatment or Interference With Search and Rescue Dog.
- Instruction No. 7.544. Interference With or Mistreatment of Service Animal.
- Instruction No. 7.580. Defense of Reasonable Conduct Toward Animal.

*(Text continued on page 7-3)*

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**Instruction No. 7.01. Bigamy.****I.C. 35-46-1-2.**

The crime of bigamy is defined by statute as follows:

A person who, being married and knowing that his/her spouse is alive, marries again commits bigamy, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. while married to (*name first spouse*),
3. and knowing that (*name first spouse*) was alive,
4. married (*name alleged subsequent spouse*
5. and Defendant did not reasonably believe [he] [she] was eligible to remarry].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of bigamy, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The fifth element should be included when there is evidence raising an inference of reasonable belief in eligibility to remarry. The element provides for the statutory defense, to be disproved by the State, in subsection (b) of the bigamy statute.



**Instruction No. 7.03. Bigamy — Defense.**

**I.C. 35-46-1-2(b).**

This instruction has been withdrawn. The defense has been incorporated in the bigamy statute.

**Instruction No. 7.05. Incest.****I.C. 35-46-1-3.**

The crime of incest is defined by statute as follows:

A person eighteen (18) years of age or older who engages in sexual intercourse or deviate sexual conduct with another person when the person knows that the other person is related to the person biologically as a [parent] [child] [grandparent] [grandchild] [sibling] [aunt] [uncle] [niece] [nephew] commits incest, a Class C felony. [It is a class B felony if the other person was less than sixteen (16) years of age.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when [he] [she] was eighteen (18) years of age or older
3. engaged in [sexual intercourse] [deviate sexual conduct]
4. with [*name other person*]
5. when Defendant knew that [*name other person*] was related to Defendant biologically as a
  - [parent]
  - [or]
  - [child]
  - [or]
  - [grandparent]
  - [or]
  - [grandchild]
  - [or]
  - [sibling]
  - [or]
  - [aunt]
  - [or]
  - [uncle]
  - [or]
  - [niece]
  - [or]
  - [nephew]
- [6. and at the time of the [sexual intercourse] [deviate sexual conduct] [*name other person*] was less than sixteen (16) years of age].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of incest, a Class C/B felony, charged in Count \_\_\_\_\_.



**Comments**

The terms "sexual intercourse" and "deviate sexual conduct" are defined by law. See I.C. 35-41-1-26 and I.C. 35-41-1-9; Instruction Nos. 14.189 and 14.57.

**Instruction No. 7.07. Incest — Defense.****I.C. 35-46-1-3(b).**

It is a defense to the charge of incest that at the time of the (sexual intercourse) (deviate sexual conduct):

1. Defendant and (*name other person*) were married
2. and the marriage was valid under the laws of the state or country where it was entered into or where the marriage ceremony was performed].



## Comments

This defense does not negate any element of the incest crime, and so the burden to prove the defense rests on the Defendant:

In general, a defendant bears the burden of proving an affirmative defense. However, if the affirmative defense specifically negates an element of the crime, then the burden of proof lies on the State to establish beyond a reasonable doubt the absence of the affirmative defense. *Ward v. State*, 438 N.E.2d 750, 753 (Ind. 1982), (citing *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).) A difference exists between facts in mitigation of culpability that are separate and distinct from the elements of the crime and an affirmative defense that negates an element of the crime. *Ward*, 438 N.E.2d at 753.

*Blatchford v. State*, 673 N.E.2d 781, 782–83 (Ind. Ct. App. 1996) (holding burden to prove statutory defense of inability to pay support was Defendant's).

**Instruction No. 7.09. Neglect of Dependent.****I.C. 35-46-1-4.**

The crime of neglect of a dependent is defined by statute as follows:

A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally (places the dependent in a situation that endangers the dependent's life or health), (abandons or cruelly confines the dependent), (deprives the dependent of necessary support), or (deprives the dependent of education as required by law) commits neglect of a dependent, a Class D felony. [The offense is a Class C felony if it results in bodily injury (*note—this C felony enhancement does not apply to neglect based on depriving of education*) or is (committed in a location where a person is violating I.C. 35-48-4-1 delivery, financing, or manufacture of cocaine, or a narcotic drug) (committed in a location where a person is violating I.C. 35-48-4-1.1 delivery, financing, or manufacture of methamphetamine) (the result of a violation of I.C. 35-48-4-1 delivery, financing, or manufacture of cocaine or a narcotic drug) (the result of a violation of I.C. 35-48-4-1 delivery, financing, or manufacture of methamphetamine).]

[The offense is a Class C felony if it consists of cruel or unusual confinement or abandonment (*note—this C felony enhancement applies only to neglect based on abandoning or confining*).] [The offense is a Class B felony if it results in serious bodily injury (*note—this B felony enhancement does not apply to neglect based on depriving of education*).] [The offense is a Class A felony if it is committed by a person at least eighteen (18) years of age and results in the death of a dependent who is less than fourteen (14) years of age (*note—this A felony enhancement does not apply to neglect based on depriving of education*).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. knowingly or intentionally;
3. [placed (*name*) in a situation that endangered (*name* ('s)) life or health]  
[or]  
[abandoned or cruelly confined (*name*)]  
[or]  
[deprived (*name*) of necessary support]  
[or]  
[deprived (*name*) of education as required by law];
4. when (*name*) was a dependent and when Defendant had the care, custody, or control of (*name*), whether assumed voluntarily or because of a legal obligation;



- [5. (for Class C felony) and the offense resulted in bodily injury to (name) (do not use this element for neglect based on deprivation of education)];
- [6. (for Class C felony) and the offense consisted of cruel or unusual confinement or abandonment (use this element only for neglect based on confinement or abandonment)];
- [7. (for Class C felony) and the offense was [committed in a location where a person was violating] [the result of a violation of] [I.C. 35-48-4-1, which prohibits the delivery, financing, or manufacture of cocaine or a narcotic drug (do not use this element for neglect based on deprivation of education)] [I.C. 35-48-4-1.1, which prohibits the delivery, financing, or manufacture of methamphetamine (do not use this element for neglect based on deprivation of education)]];
- [8. (for Class C felony) and the offense resulted in the death of (name), who was less than fourteen (14) years of age (do not use this element for neglect based on deprivation of education)];
- [9. (for Class B felony) and the offense resulted in serious bodily injury to (name) (do not use this element for neglect based on deprivation of education)];
- [10. (for Class A felony) and the offense resulted in the death of (name), who was less than fourteen (14) years of age (do not use this element for neglect based on deprivation of education)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of neglect of a dependent, a Class D/C/B/A felony, charged in Count \_\_\_\_\_.

[If the State did prove each of these elements beyond a reasonable doubt, but the Defendant proved by the greater weight of the evidence that, in the legitimate practice of [his] or [her] religious belief, the Defendant provided treatment by spiritual means through prayer, in lieu of medical care, to (name dependent), you must find the Defendant not guilty of neglect of a dependent, a Class D/C/B/A felony, charged in Count \_\_\_\_\_.]

### Comments

The terms “dependent,” “serious bodily injury” and “support” are defined by law. See I.C. 35-46-1-1 and I.C. 35-41-1-25; Instruction Nos. 14.55, 14.185, and 14.201.

The “actually and appreciably” language in the instruction is required by *State v. Downey*, 476 N.E.2d 121 (Ind. 1985). See *White v. State*, 547 N.E.2d 831 (Ind. 1989).

The statutory neglect of a dependent defense for religious practice is found in Instruction No. 7.13. The instruction contains an optional final paragraph to use when the religious practice defense is at issue.

The statutory defense for leaving a child 30 days of age or less with an

emergency medical provider is contained in Instruction No. 7.14. This defense has not been incorporated in the pattern instruction above, and so suitable modification of this instruction must be made when the emergency medical provider defense is at issue.

Note that the C felony enhancement for “cruel” confinement or abandonment has no literal difference from the D felony neglect based on “cruel” confinement. The Committee suggests that the trial judge address this ostensible duplication, when it is presented by the charging instrument alleging both D and C felony “cruel” confinement, as early in the case as possible.

The court should instruct separately on the greater weight of the evidence by using Model Civil Jury Instruction No. 111:

Evidence is of the greater weight if it convinces you more strongly of its truthfulness. It is evidence that convinces you that something is more probably true than not true.

A greater number of witnesses testifying to a fact on one side or a greater quantity of evidence introduced on one side does not necessarily amount to the greater weight of the evidence.

*(Text continued on page 7-13)*



**Instruction No. 7.11. Neglect of a Dependent Resulting in Serious Bodily Injury.**

**I.C. 35-46-1-4.**

This instruction has been withdrawn. It is incorporated into Instruction No. 7.09.

**Instruction No. 7.13. Neglect of a Dependent — Defense.****I.C. 35-46-1-4(b).**

It is a defense to the charge of neglect of a dependent that the Defendant, in the legitimate practice of [his] [her] religious belief, provided treatment by spiritual means through prayer, in lieu of medical care to [his] [her] dependent.

The Defendant has the burden of proving this defense by a preponderance of the evidence.



**Comments**

The religious practice defense is for the Defendant to prove. *Bergmann v. State*, 486 N.E.2d 653 (Ind. Ct. App. 1985).

**Instruction No. 7.14. Neglect of a Dependent — Emergency  
Medical Provider Defense.**

**I.C. 35-46-1-4(c)(1).**

It is a defense to the charge of neglect of a dependent that:

1. The Defendant voluntarily left the child with an emergency medical provider who took custody of the child when the Defendant expressed no intent to return, and
2. the child was not more than thirty (30) days of age
3. and the charge of neglect of a dependent is based solely on the alleged act of having left the child with the emergency medical provider
4. and the alleged act of leaving the child with the emergency medical provider did not result in bodily injury or serious bodily injury to the child.

The Defendant has the burden of proving this defense by a preponderance of the evidence.



**Comments**

The term "emergency medical services provider" is defined by law. See I.C. 16-41-10-1; Instruction No. 14.76a.

This defense does not negate any element of the neglect of a dependent crime, and so the burden to prove the defense rests on the Defendant:

In general, a defendant bears the burden of proving an affirmative defense. However, if the affirmative defense specifically negates an element of the crime, then the burden of proof lies on the State to establish beyond a reasonable doubt the absence of the affirmative defense. *Ward v. State*, 438 N.E.2d 750, 753 (Ind. 1982), (citing *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).) A difference exists between facts in mitigation of culpability that are separate and distinct from the elements of the crime and an affirmative defense that negates an element of the crime. *Ward*, 438 N.E.2d at 753.

*Blatchford v. State*, 673 N.E.2d 781, 7872-83 (Ind. Ct. App. 1996) (holding burden to prove statutory defense of inability to pay support was Defendant's).

**Instruction No. 7.15. Non-support of a Dependent Child.****I.C. 35-46-1-5.**

The crime of non-support of a dependent child is defined by statute as follows:

A person who knowingly or intentionally fails to provide support to [his] [her] dependent child commits non-support of a child, a Class D felony. [The offense is a Class C felony if the total amount of unpaid support that is due and owing for one (1) or more children is at least fifteen thousand dollars (\$15,000).]

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. failed to provide support to [name]
4. when [name was] [names were] Defendant's dependent child[ren]
5. (for Class C felony) and the total amount of unpaid support due and owing for one or more children is at least fifteen thousand (15,000.00) dollars].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of non-support of a dependent child, a Class D/C felony.



**Comments**

The terms "dependent" and "support" are defined by law. See I.C. 35-46-1-1; Instruction Nos. 14.155 and 14.201.

**Instruction No. 7.17. Non-support of a Dependent Child —  
Defense.**

**I.C. 35-46-1-5(b).**

It is a defense to the charge of non-support of a dependent child that the child abandoned the home of his family without the consent of his parent or on the order of a court. But it is not a defense that the child abandoned the home of his family if the cause of the child's leaving was the fault of his parent.

The Defendant has the burden of proving this defense, by a preponderance of the evidence.



**Comments**

This defense does not negate any element of the crime, and so the burden to prove the defense rests on the Defendant:

In general, a defendant bears the burden of proving an affirmative defense. However, if the affirmative defense specifically negates an element of the crime, then the burden of proof lies on the State to establish beyond a reasonable doubt the absence of the affirmative defense. *Ward v. State*, 438 N.E.2d 750, 753 (Ind. 1982), (citing *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).) A difference exists between facts in mitigation of culpability that are separate and distinct from the elements of the crime and an affirmative defense that negates an element of the crime. *Ward*, 438 N.E.2d at 753.

*Blatchford v. State*, 673 N.E.2d 781, 782-83 (Ind. Ct. App. 1996) (holding burden to prove statutory defense of inability to pay support was Defendant's).

**Instruction No. 7.19. Non-support of a Dependent Child —  
Defense.**

**I.C. 35-46-1-5(c).**

It is a defense to the charge of non-support of a dependent child that the accused, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent child.

The Defendant has the burden of proving this defense by a preponderance of the evidence.



**Comments**

The religious practice defense to neglect of a dependant is for the Defendant to prove, *Bergmann v. State*, 486 N.E.2d 653 (Ind. Ct. App. 1985), and there appears to be no reason why the same result should not obtain for non-support.

**Instruction No. 7.21. Non-support of a Dependent Child —  
Defense.**

**I.C. 35-46-1-5(d).**

It is a defense to the charge of non-support of a dependent child that the Defendant was unable to provide support.

The Defendant has the burden of proving, by a preponderance of the evidence, that he was unable to provide support.



**Comments**

Indiana has held, and the Seventh Circuit affirmed, that the burden to prove this defense is the Defendant's and that giving the burden to the Defendant does not violate the federal Constitution. *Davis v. State* (1985), 481 N.E.2d 434, *transfer denied*, Feb. 24, 1986; *Davis v. Barber*, 657 F. Supp. 469 (N.D. Ind. 1987), *affirmed*, 853 F.2d 1418 (7th Cir. 1988). See also *Blatchford v. State*, 673 N.E.2d 781 (Ind. Ct. App. 1996).

**Instruction No. 7.23. Non-support of a Spouse.****I.C. 35-46-1-6(a).**

The crime of non-support of a spouse is defined by statute as follows:

A person who knowingly or intentionally fails to provide support to his spouse, when the spouse needs support, commits non-support of a spouse, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. failed to provide support to (*name*), his spouse
4. when (*name*) needed support.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of non-support of a spouse, a Class D felony, charged in Count \_\_\_\_\_.



**Comments**

The term "support" is defined by law. See I.C. 35-46-1-1; Instruction No. 14.201.

**Instruction No. 7.25. Non-support of a Spouse — Defense.****I.C. 35-46-1-6(b).**

It is a defense to the charge of non-support of a spouse that the Defendant was unable to provide support.

The Defendant has the burden of proving, by a preponderance of the evidence, that [he] [she] was unable to provide support.



**Comments**

Because this defense is substantially like inability to provide child support, which has been held to be the Defendant's burden to prove, *Blatchford v. State*, 673 N.E.2d 781 (Ind. Ct. App. 1996), the Committee concludes the Defendant should have the burden to prove the defense of inability to provide support to a spouse.

**Instruction No. 7.27. Child Selling.****I.C. 35-46-1-4.**

The crime of child selling is defined by statute as follows:

A person having the care of a dependent child, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally transfers or receives any property in consideration for the termination of the care, custody, or control of the person's dependent child commits child selling, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. had the care of [name], a dependent child, and
3. knowingly or intentionally
4. [transferred] [received] property
5. in consideration for the termination of the care, custody, or control of [name],

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of child selling, a Class D felony.



**Comments**

The terms "dependent" and "property" are defined by law. See I.C. 35-41-1-23 and I.C. 35-46-1-1; Instruction Nos. 14.55 and 14.165.

**Instruction No. 7.29. Child Selling — Exception.****I.C. 35-46-1-4(c).**

The child selling offense does not apply to property transferred or received:

[under a court order made in connection with divorce, support, or custody proceedings;]

[or]

[with respect to an adoption, for reasonable attorney fees, hospital and medical expenses concerning childbirth and pregnancy incurred by the adopted person's natural mother, reasonable charges and fees levied by a licensed child-placing agency or by a county department of public welfare, or other charges and fees approved by a court supervising the adoption.]

The Defendant has the burden of proving by a preponderance of the evidence that the property was transferred or received under the court order as described above.



**Comments**

I.C. 35-46-1-4(c) provides that any property transferred or received is illegal, "except for" when pursuant to the court orders listed above. This "except for" language suggests that the court orders were intended to be exceptions to liability, and consequently that the burden to prove the applicability of the exceptions lies on the Defendant. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001).

**Instruction No. 7.31. Profiting from an Adoption.****I.C. 35-46-1-9.**

The crime of profiting from an adoption is defined by statute as follows:

A person who, with respect to an adoption, transfers or receives any property in connection with the waiver of parental rights, the termination of parental rights, the consent to adoption, or the petition for adoption commits profiting from an adoption, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. with respect to an adoption
3. knowingly or intentionally
4. transferred or received property, (*describe property as alleged*) in connection with
  - [the waiver of parental rights]
  - [or]
  - [the termination of parental rights]
  - [or]
  - [the consent to adoption]
  - [or]
  - [the petition for adoption].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of profiting from an adoption, a Class D felony.



**Comments**

The term "property" is defined by law. See I.C. 35-41-1-23; Instruction No. 14.165.

**Instruction No. 7.33. Profiting from an Adoption — Defense.****I.C. 35-46-1-9(b).**

It is a defense to the charge of profiting from an adoption that the person who transferred or received any property in connection with [the waiver of parental rights] [the termination of parental rights] [the consent to adoption] [the petition for adoption] transferred or received the property for:

[reasonable attorney fees]

[or]

[hospital and medical expenses concerning childbirth and pregnancy incurred by the adopted person's natural mother]

[or]

[reasonable charges and fees levied by a child-placing agency licensed under IC 12-17.4 or by a county department of public welfare]

[or]

[reasonable costs of housing, utilities, and phone service for the adopted person's birth mother during the second or third trimester of pregnancy and not more than six (6) weeks after childbirth]

[or]

[reasonable costs of maternity clothing for the adopted person's birth mother]

[or]

[reasonable travel expenses incurred by the adopted person's birth mother that relate to the pregnancy or adoption]

[or]

[any additional itemized necessary living expenses for the adopted person's birth mother during the second or third trimester of pregnancy and not more than six (6) weeks after childbirth not listed in the preceding three paragraphs in an amount not to exceed one thousand dollars (\$1,000)]

[or]

[other charges and fees approved by the court supervising the adoption, including reimbursement of not more than actual wages lost as a result of the inability of the adopted person's birth mother to work at her regular, existing employment due to a medical condition, excluding a psychological condition, if:



(A) the attending physician of the adopted person's birth mother has ordered or recommended that the adopted person's birth mother discontinue her employment; and

(B) the medical condition and its direct relationship to the pregnancy of the adopted person's birth mother are documented by her attending physician].

The Defendant has the burden of proving this defense by a preponderance of the evidence.

### Comments

This defense does not negate any element of the profiting from an adoption crime. It provides that some kinds of property transferred or received in connection with the adoption will be exempt from criminal liability, on policy grounds. It appears for these reasons that the burden to prove the defense rests on the Defendant:

In general, a defendant bears the burden of proving an affirmative defense. However, if the affirmative defense specifically negates an element of the crime, then the burden of proof lies on the State to establish beyond a reasonable doubt the absence of the affirmative defense. *Ward v. State*, 438 N.E.2d 750, 753 (Ind. 1982), (citing *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).) A difference exists between facts in mitigation of culpability that are separate and distinct from the elements of the crime and an affirmative defense that negates an element of the crime. *Ward*, 438 N.E.2d at 753.

*Blatchford v. State*, 673 N.E.2d 781, 7872-83 (Ind. Ct. App. 1996) (holding burden to prove statutory defense of inability to pay support was Defendant's).



**Instruction No. 7.33a. Contributing to the Delinquency of a Minor, with Enhancements for Dealing, Delivering, Manufacturing.**

**I.C. 35-46-1-8.**

The crime of contributing to the delinquency of a minor is defined by statute as follows:

A person eighteen (18) years of age or older who knowingly or intentionally [encourages], [aids], [induces], or [causes] a person under eighteen (18) years of age to commit an act of delinquency as defined by I.C. 31-6-4-1 commits contributing to delinquency, a Class A misdemeanor.

{The offense is a Class C felony if the person knowingly or intentionally [encourages], [aids], [induces], or [causes] a person less than eighteen (18) years of age to commit an act that would be the felony if committed by an adult of

[dealing in (cocaine), (a narcotic drug), I.C. 35-48-4-1]

[dealing in methamphetamine, IC 35-48-4-1.1]

[dealing in a Schedule I, II, or III controlled substance, I.C. 35-48-4-2]

[dealing in a Schedule IV controlled substance, I.C. 35-48-4-3]

[dealing in a Schedule V controlled substance, I.C. 35-48-4-4]

[delivering or financing delivery of a substance represented to be a controlled substance, I.C. 35-48-4-4.5]

[manufacturing, financing, advertising, or possessing with intent to manufacture, finance, advertise, or deliver a substance represented to be a controlled substance, I.C. 35-48-4-4.6]

[dealing in a counterfeit substance, I.C. 35-48-4-5].}

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. knowingly or intentionally;
3. [encouraged], [aided], [induced], or [caused] (*name minor*), who was at the time less than eighteen (18) years of age, to commit;

4. (*name delinquent act alleged*), an act of delinquency, by encouraging, aiding, inducing, or causing (*name minor*) to (*recite alleged conduct constituting delinquent act*);
5. (*for Class C felony*) and the act of delinquency which Defendant [encouraged] [aided, [induced] [caused] was an act which, if committed by an adult, would have been the felony of:

[dealing in (cocaine), (a narcotic drug), I.C. 35-48-4-1, by knowingly or intentionally

(manufacturing)

(or)

(financing the manufacture of)

(or)

(delivering)

(or)

(financing the delivery of)

(or)

(possessing with the intent to manufacture, to finance the manufacture, to deliver, or to finance the delivery of)

(cocaine)

(or)

(*{name alleged drug}*, a narcotic drug, pure or adulterated, classified in schedule I or II)

[or]

[dealing in methamphetamine, I.C. 35-48-4-1.1, by knowingly or intentionally

(manufacturing)

(or)

(financing the manufacture of)

(or)

(delivering)

(or)



(financing the delivery of)

(or)

(possessing with the intent to manufacture, to finance the manufacture, to deliver, or to finance the delivery of)

methamphetamine]

[or]

[dealing in a Schedule I, II, or III controlled substance, I.C. 35-48-4-2, by knowingly or intentionally

(manufacturing)

(or)

(financing the manufacture of)

(or)

(delivering)

(or)

(financing the delivery of)

(or)

(possessing, with intent to manufacture, to finance the manufacture, to deliver, or to finance the delivery of)

(*name alleged substance*), a controlled substance, pure or adulterated, classified in schedule I, II, or III, except marijuana, hash oil, or hashish]

[or]

[dealing in a Schedule IV controlled substance, I.C. 35-48-4-3, by knowingly or intentionally

(manufacturing)

(or)

(financing the manufacture of)

(or)

(delivering)

(or)

(financing the delivery of)

(or)

(possessing, with intent to manufacture, to finance the manufacture, to deliver, or to finance the delivery of)

(*name alleged substance*), a controlled substance, pure or adulterated, classified in schedule IV]

[or]

[dealing in a Schedule V controlled substance, I.C. 35-48-4-4, by knowingly or intentionally

(manufacturing)

(or)

(financing the manufacture of)

(or)

(delivering)

(or)

(financing the delivery of)

(or)

(possessing, with intent to manufacture, to finance the manufacture, to deliver, or to finance the delivery of)

(*name alleged substance*), a controlled substance, pure or adulterated, classified in schedule V]

[or]

[delivering or financing delivery of a substance represented to be a controlled substance, I.C. 35-48-4-4.5, by knowingly or intentionally

(delivering)

(or)

(financing the delivery of)

a substance, other than a controlled substance or a drug for which a prescription is required under federal or state law, that

(was expressly or impliedly represented to be (*name*), a controlled substance)

(or)



(was distributed under circumstances that would lead a reasonable person to believe that the substance was (*name*), a controlled substance)

(by overall dosage unit appearance, including shape, color, size, markings, or lack of markings, taste, consistency, or any other identifying physical characteristic of the substance, would have lead a reasonable person to believe that the substance was {*name alleged substance*}, a controlled substance))

[or]

[manufacturing, financing, advertising, or possessing with intent to manufacture, finance, advertise, or deliver a substance represented to be a controlled substance, I.C. 35-48-4-4.6, by

(manufacturing)

(or)

(financing the manufacture of)

(or)

(advertising)

(or)

(possessing with intent to manufacture, finance the manufacture of, advertise, or distribute)

a substance under I.C. 35-48-4-4.5 that was

(expressly or impliedly represented to be (*name*), a controlled substance)

(or)

(was distributed under circumstances that would lead a reasonable person to believe that the substance was (*name*), a controlled substance)

(or)

(by overall dosage unit appearance, including shape, color, size, markings, or lack of markings, taste, consistency, or any other identifying physical characteristic of the substance, would have lead a reasonable person to believe that the substance was (*name alleged substance*), a controlled

substance))

[or]

[manufacturing, financing, advertising, or possessing with intent to manufacture, finance, advertise, or deliver a substance represented to be a controlled substance, I.C. 35-48-4-4.6, by knowingly or intentionally

(manufacturing)

(or)

(financing the manufacture of)

(or)

(advertising)

(or)

(distributing)

(or)

(possessing with intent to manufacture or to finance the manufacture or to advertise or to distribute)

a substance, other than a controlled substance or a drug for which a prescription is required under federal or state law, that was

(expressly or impliedly represented to be *(name)*, a controlled substance)

(or)

(was distributed under circumstances that would lead a reasonable person to believe that the substance was *(name)*, a controlled substance)

(or)

(by overall dosage unit appearance, including shape, color, size, markings, or lack of markings, taste, consistency, or any other identifying physical characteristic of the substance, would have lead a reasonable person to believe that the substance was *(name alleged substance)*, a controlled substance))

[or]



[dealing in a counterfeit substance, I.C. 35-48-4-5, by

(creating)

(or)

(delivering)

(or)

(financing the delivery of)

(or)

(possessing with intent to deliver or finance the delivery of)

a counterfeit substance]].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of contributing to the delinquency of a minor, a Class A misdemeanor/Class C felony, charged in Count \_\_\_\_\_.

### Comments

The term "delinquent act" is defined by I.C. 31-37-1-2.

**Instruction No. 7.33b. Contributing to the Delinquency of a Minor, with Enhancements for Furnishing Alcohol or Drugs****I.C. 35-46-1-8.**

The crime of contributing to the delinquency of a minor is defined by statute as follows:

A person eighteen (18) years of age or older who knowingly or intentionally [encourages] [aids] [induces] [causes] a person under eighteen (18) years of age to commit an act of delinquency as defined by IC 31-6-4-1 commits contributing to delinquency, a Class A misdemeanor.

{The offense is a Class C felony if the person is at least twenty-one (21) years of age) and knowingly or intentionally furnishes:

[an alcoholic beverage to a person less than eighteen (18) years of age in violation of IC 7.1-5-7-8 when the person knew or reasonably should have known that the person was less than eighteen (18) years of age]

[or]

[a controlled substance as defined in IC 35-48-1-9 in violation of Indiana law]

[a drug as defined in IC 9-13-2-49.1 in violation of Indiana law]

[or]

and consumption, ingestion, or use of the [alcoholic beverage] controlled substance, or drug is the proximate cause of the death of any person.}

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [encouraged] [aided] [induced] [caused] (*name minor*), who was at the time less than eighteen (18) years of age, to commit
4. (*name delinquent act alleged*), an act of delinquency, by [encouraging] [aiding] [inducing] [causing] (*name minor*) to (*recite alleged conduct constituting delinquent act*)
- {5. and the Defendant was at least twenty-one (21) years of age and knowingly or intentionally furnished:



[an alcoholic beverage to (*name*), a person less than eighteen years of age, whom Defendant knew or should have known was less than eighteen years of age]

[or]

[(*name substance or drug*), a (controlled substance) (drug) in violation of Indiana law]

and [consumption] [ingestion] [use] of the [alcoholic beverage] [controlled substance] [drug] was the proximate cause of the death of (*name person*).}

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of contributing to the delinquency of a minor, a Class A misdemeanor/class C felony, charged in Count\_\_\_\_\_.

### Comments

The term "delinquent act" is defined by I.C. 31-37-1-2.

**Instruction No. 7.34. Voyeurism.**

**I.C. 35-45-4-5.**

**This instruction has been transferred to Chapter 6, as Instruction No. 6.12.**



**Instruction No. 7.35. Carrying Handgun Without a License.**

**I.C. 35-47-2-1.**

**I.C. 35-47-2-23(c).**

The crime of carrying a handgun without a license is defined by statute as follows:

A person who carries a handgun in any vehicle or on or about his person, except in his dwelling, on his property, or fixed place of business, without a license issued under this chapter being in his possession, commits carrying a handgun without a license, a Class A misdemeanor. [The offense is a Class C felony if it is committed (on or in school property) (within one thousand (1,000) feet of school property) (on a school bus).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. carried a handgun [in a vehicle] [on or about (his) or (her) person];
3. away from Defendant's dwelling, property, or fixed place of business;
4. and the offense was committed:
  - [on or in school property]
  - [or]
  - [within 1000 feet of school property]
  - [or]
  - [on a school bus]).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of carrying a handgun without a license, a Class A misdemeanor/C felony, charged in Count \_\_\_\_\_.

[*If exception of valid license raised:*] It is a defense that the Defendant had been issued a license to carry a handgun which was valid at the time of the charged offense, and the burden is on the Defendant to prove this defense by a preponderance of the evidence. If the State proved each of the elements of the offense listed above beyond a reasonable doubt, and the Defendant proved by a preponder-

ance of the evidence that he/she possessed a valid license, you must find the Defendant not guilty of carrying a handgun without a license, a Class A misdemeanor.]

### Comments

The terms "handgun" and "school property" are defined by law. See I.C. 35-47-1-6 and I.C. 35-41-1-24.7; Instruction Nos. 14.101 and 14.183.

A trial of carrying a handgun without a license as a Class C felony for having a prior conviction of the same offense or of a felony within 15 years must be bifurcated. See Chapter 15.

"[O]nce the State proves that the defendant carried a handgun on or about his person, away from his dwelling or business, the burden shifts to the defendant to establish that he possessed a valid license. . . . [P]roof that [the defendant] had a license is an exception to the offense, and the burden is on [the defendant] to prove he possessed a valid license.' "

*Harris v. State*, 716 N.E.2d 406, 411 (Ind. 1999).

While the possession of a valid license is in fact an "exception," the instruction refers to it as a "defense" in the belief that the latter term is readily comprehended by the jury and defining the former term would be unnecessarily confusing for jurors.



**Instruction No. 7.37. Carrying Handgun Without a License —  
Defense.**

**I.C. 35-47-2-2.**

The statute requiring a license to carry a handgun does not apply to:

[a marshal]

[or]

[a sheriff]

[or]

[the commissioner of the department of corrections or a person  
authorized by the commissioner in writing to carry firearms]

[or]

[a judicial officer]

[or]

[a law enforcement officer]

[or]

[a member of the armed forces of the United States or of the national  
guard or organized reserves while he/she is on duty]

[or]

[a regularly enrolled member of any organization duly authorized to  
purchase or receive such weapons from the United States or from this  
state who is at or is going to or from his place of assembly or target  
practice]

[or]

[an employee of the United States duly authorized to carry hand-  
guns]

[or]

[an employee of express companies when engaged in company  
business]

[or]

[any person engaged in the business of manufacturing, repairing, or  
dealing in firearms or the agent or representative of any such person  
having in his possession, using or carrying a handgun in the usual or  
ordinary course of that business]

[or]

[any person while carrying a handgun unloaded and in a secure wrapper from the place of purchase to his dwelling or fixed place

*(Text continued on page 7-49)*



of business, or to a place of repair or back to his dwelling or fixed place of business, or in moving from one dwelling or business to another.

The Defendant has the burden of proving this defense by a preponderance of the evidence.

**Comments**

The term "handgun" is defined by law. See I.C. 35-47-1-6; Instruction No. 14.101.

The instruction refers to the "defense," but in fact the exemptions from the license requirement are exceptions. The Defendant has the burden to prove they apply. See *McKeller v. State* (1993), Ind. App., 620 N.E.2d 744, 746 (similar factors lead the Court of Appeals to find an "exception"; when the General Assembly creates an "exemption to the offense," the State "is not required to prove the nonexistence of any exemption . . . as a requisite element"). See also *Washington v. State* (1987), Ind., 517 N.E.2d 77, 79, citing *Lewis v. State* (1985), Ind. App., 484 N.E.2d 77, 80 (with an exception or exemption, Defendant has the burden of persuasion to prove the exemption by a preponderance of the evidence).



**Instruction No. 7.38. Possession of Firearms on School Property,  
at School Functions, or On School Bus.**

**I.C. 35-47-9-2.**

The crime of possessing a firearm on school property is defined by statute as follows:

A person who possesses a firearm [in or on school property] [in or on property that is being used by a school for a school function] [on a school bus] commits a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. did knowingly or intentionally\*
3. possess a firearm
4. [in or on school property]

[or]

[in or on property that is being used by a school for a school function]

[or]

[on a school bus.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a firearm on school property, a class D felony, charged in Count \_\_\_\_\_.

### Comments

The terms "firearm," "school bus," and "school property" are defined by law. See I.S. 35-47-1-5, I.C. 35-41-1-24.3, and I.C. 35-41-1-24.7; Instruction Nos. 14.87, 14.181, and 14.183.

Note that specified law enforcement officers are exempt from liability for this offense. See I.C. 35-47-9-1.

\*The Committee believes that a *mens rea* element is properly implied for this crime. See *State v. Keihn* (1989), Ind., 542 N.E.2d 963 (guidance on whether to imply a *mens rea* element in a "silent" statute). The Committee recommends that this *mens rea* element be considered applicable to all elements of the crime, including the proximity to schools or school property elements. The Committee is aware of the Indiana cases holding that knowledge or intent as to school proximity enhancement factors is not required by the Indiana Code controlled substance offenses. *Schnitz v. State* (1995), Ind. App., 650 N.E.2d 717; *Steelman v. State* (1992), Ind. App., 602 N.E.2d 152; *Williford v. State* (1991), Ind. App., 571 N.E.2d 310, *transfer denied*, 577 N.E.2d 963 (DeBruler, J., dissenting). However, a critical aspect of these cases was their conclusion that:

our statute does not allow a conviction for innocent conduct. Mens rea must be proven for a conviction for dealing; however, the penalty may be enhanced upon a showing of additional facts without proof of knowledge of those facts.

*Williford, supra.*

Here, however, "innocent activity" (e.g., possession of a handgun with a proper license) would be criminalized without any *mens rea* unless a knowledge element is implied for the school proximity element. See also *Staples v. United States*, 511 U.S. 600, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) (rejects government argument that possession of machine gun offense does not require proof Defendant knew his gun had the characteristics incorporated in the federal statutory definition of "machinegun"; "[i]f we were to accept as a general rule the Government's suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results").



**Instruction No. 7.39. Prohibited Sale or Transfer of Handgun or Assault Weapon to Minor.****I.C. 35-47-2-7(a), I.C. 35-47-2-23(b).**

The crime of prohibited sale or transfer of a [handgun] [an assault weapon] to a minor is defined by statute as follows:

[A] person who sells, gives, or in any other manner transfers the ownership or possession of a [handgun] [assault weapon] to any person under eighteen (18) years of age commits prohibited sale or transfer of a [handgun] [an assault weapon] to a minor, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. sold, gave, or in some other manner transferred ownership or possession of [a handgun] [an assault weapon]
3. to (name) when (name) was less than eighteen (18) years of age.

If the State failed to prove each of these elements beyond a reasonable doubt, [or if the Defendant proved a defense by a preponderance of the evidence,] you must find the Defendant not guilty of prohibited sale or transfer of [a handgun] [an assault weapon], a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "assault weapon" and "handgun" are defined by law. See I.C. 35-50-2-11 and I.C. 35-47-1-6; Instruction Nos. 14.10 and 14.101.

Knowledge that the person who received the weapon was under eighteen is not required in this strict liability offense. *State v. Shelton*, 642 N.E.2d 947 (Ind. Ct. App. 1998).

For an instruction on the "defense" for exceptions to liability under this statute, see Instruction No. 7.39a.



**Instruction No. 7.39a. Defense to Prohibited Sale or Transfer of Handgun or Assault Weapon to Minor.**

**I.C. 35-47-2-7(a), I.C. 35-47-2-23(b). I.C. 35-47-10-1.**

It is a defense that the person who sold, gave, or otherwise transferred ownership or possession of the [handgun] [assault weapon] did so:

[while acting in a parent-minor child relationship to the person under eighteen (18)]

[or]

[while acting in a guardian-minor protected person relationship to the person under eighteen (18)]

[or]

[for the purpose of the person under eighteen (18) attending a (hunters safety course) (a firearms safety course)]

[or]

[for the purpose of the person under eighteen (18) engaging in practice in using a handgun for target shooting:

(at an established range)

(or)

(in an area where the discharge of a firearm is:

{not prohibited}

{or}

{supervised by:

(a qualified firearms instructor)

(or)

(an adult who is supervising the child while the child is at the range)))]

[or]

[for the purpose of the person under eighteen (18) engaging in an organized competition involving the use of a handgun\*]

[or]

[for the purpose of the person under eighteen (18) participating in or practicing for a performance by an organized group under Section 501(c)(3) of the Internal Revenue Code that uses handguns as a part of a performance\*]

[or]

[for the purpose of the person under eighteen (18) (hunting) (trapping) under a valid (hunting)(trapping) license issued to the child under Ind. Code § 14-2-7]

[or]

[for the purpose of the person under eighteen (18) traveling with an unloaded handgun (to) (from) (*specify Ind. Code § 35-47-10-1 activity listed above*)] [or]

[to a person under eighteen (18):

who is on real property that is under control of the person's (parent) (an adult family member of the person) (the person's legal guardian) and

who has permission to possess a handgun from the person's (parent) (an adult family member of the person) (the person's legal guardian)]

[or]

[to a person under eighteen (18) who:

is at (his) (her) residence

and

has permission from:

[[his] [her] parent]

(or)

(an adult member of [his] [her] family)

(or)

[[his] [her] legal guardian]

to possess a handgun.]

The Defendant has the burden to prove this defense by a preponderance of the evidence.



**Comments**

The term "handgun" is defined by law. See I.C. 35-47-1-6; Instruction No. 14.101.

Strictly speaking, this instruction catalogs a set of exceptions to the crime, not a "defense." But, as the burden instruction is the same for a defense as for an exception, and the conception of a defense is more common than that for an exception, the Committee has used the term "defense" in this instruction. See *McKeller v. State* (1993), Ind. App., 620 N.E.2d 744, 746 (similar factors lead the Court of Appeals to find an "exception"; when the General Assembly creates an "exemption to the offense," the State "is not required to prove the nonexistence of any exemption . . . as a requisite element"). See also *Washington v. State* (1987), Ind., 517 N.E.2d 77, 79, citing *Lewis v. State* (1985), Ind. App., 484 N.E.2d 77, 80 (with an exception or exemption, Defendant has the burden of persuasion to prove the exemption by a preponderance of the evidence).



**Instruction No. 7.39b. Prohibited Sale or Transfer of Handgun to  
Felon, Drug or Alcohol Abuser, or  
Incompetent.**

**I.C. 35-47-2-7(b), I.C. 35-47-2-23(b).**

The crime of prohibited sale or transfer of a handgun is defined by statute as follows:

A person who sells, gives, or in any other manner transfers the ownership or possession of a handgun to another person who the person has reasonable cause to believe [has been convicted of a felony] [is a drug abuser] [is an alcohol abuser] [is mentally incompetent] commits prohibited sale or transfer of [a handgun][an assault weapon], a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. sold, gave, or in some other manner transferred ownership or possession of a handgun to *(name)*
3. when the Defendant had reasonable cause to believe that *(name)*:
  - [had been previously convicted of a felony]
  - [or]
  - [was a drug abuser]
  - [or]
  - [was an alcohol abuser]
  - [or]
  - [was mentally incompetent].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of prohibited sale or transfer of [a handgun][an assault weapon], a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "alcohol abuser," "drug abuser," and "handgun" are defined by law. See I.C. 35-47-1-2, I.C. 35-47-2-4 and I.C. 35-47-1-6; Instruction Nos. 14.09, 14.73, and 14.101.

**Instruction No. 7.39c. Dangerous Possession of a Firearm — Non-Exempt Purpose.**

**I.C. 35-47-10-5(1).**

The crime of dangerous possession of a firearm is defined as follows:

A person under age eighteen (18) who knowingly, intentionally, or recklessly possesses a firearm for any purpose other than for the purpose of attending a hunters safety course or a firearms safety course

or

for the purpose of engaging in practice in using a firearm for target shooting:

at an established range

or

in an area where the discharge of a firearm is:

not prohibited

or

supervised by:

a qualified firearms instructor

or

an adult who is supervising the person under age eighteen (18) while the person under age eighteen (18) is in the area

or

for the purpose of engaging in an organized competition involving the use of a firearm

or

for the purpose of the person under eighteen (18) participating in or practicing for a performance by an organized group under Section 501(c)(3) of the Internal Revenue Code that uses firearms as a part of a performance

or

for the purpose of the person under eighteen (18) hunting or trapping under a valid hunting trapping license issued to the person under age eighteen (18) under Ind. Code § 14-2-7

or

for the purpose of the person under eighteen (18) traveling with an unloaded firearm to or from (*specify Ind. Code § 35-47-10-1 activity listed above*)

or



having the firearm when the person under eighteen (18)

is on real property that is under control of the person's parent or an adult family member of the person or the person's legal guardian and has permission to possess a firearm from the person's parent or an adult family member of the person or the person's legal guardian

or

having the firearm when the person under eighteen (18):

is at (his) (her) residence

and

has permission from:

[his] [her] parent

or

an adult member of [his] [her] family

or

[his] [her] legal guardian

to possess a firearm

commits dangerous possession of a firearm, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when (he) (she) was under eighteen (18) years of age
3. (knowingly) (intentionally) (recklessly)
4. possessed a firearm
5. and Defendant's possession was not:

for the purpose of attending a hunters safety course or a firearms safety course

or

for the purpose of engaging in practice in using a firearm for target shooting:

at an established range

or

in an area where the discharge of a firearm was:

{not prohibited}

{or}

{supervised by:

a qualified firearms instructor

or

an adult who would supervise the Defendant while Defendant was at the place}

or

for the purpose of engaging in an organized competition involving the use of a firearm

or

for the purpose participating in or practicing for a performance by an organized group under Section 501(c)(3) of the Internal Revenue Code that used firearms as a part of a performance

or

for the purpose of hunting or trapping under a valid hunting or trapping license issued to Defendant under Ind. Code § 14-2-7

or

for the purpose of traveling with an unloaded firearm to from (*specify Ind. Code § 35-47-10-1 activity listed above*)

or

on real property that was under control of Defendant's parent or an adult family member of the Defendant or Defendant's legal guardian

and

with permission to possess a firearm from Defendant's parent or an adult family member of Defendant or Defendant's legal guardian

or

at Defendant's residence with permission from:

Defendant's] parent

or

an adult member of Defendant's family

or

Defendant's legal guardian

to possess a firearm.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of dangerous possession of a firearm, a Class A misdemeanor.

**Comments**

The terms "firearm" and "adult" are defined by law. See I.C. 35-7-1-5, I.C. 35-47-10-2, Instruction Nos. 14.101 and 14.08.

Trial of this offense as a Class C felony due to a prior conviction must be bifurcated. See Chapter 15.

The statutory language ["possesses for any purpose other than a purpose described in section 1 of this chapter] here indicates negating the list of purposes was meant to be an element for the State to prove, beyond a reasonable doubt.



**Instruction No. 7.39d. Dangerous Possession of Firearm —  
Providing to Another Child.**

**I.C. 35-47-10-5(2).**

The crime of dangerous possession of a firearm is defined by statute as follows:

A child who knowingly, intentionally, or recklessly provides a firearm to another child, with or without remuneration, commits dangerous possession of a firearm, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. while under eighteen (18) years of age
3. [knowingly] [intentionally] [recklessly]
4. provided a firearm
5. to [*name other child*] when [*name other child*] was under eighteen (18) years of age.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of dangerous possession of a firearm, a Class A misdemeanor.

**Comments**

The term "firearm" is defined by law. See I.C. 35-7-1-5; Instruction No. 14. 87.  
Trial of this offense as a Class C felony must be bifurcated. See Chapter 15.

**Instruction No. 7.39e. Dangerous Control of Firearm.****I.C. 35-47-10-6.**

The crime of dangerous control of a firearm is defined as follows:

An adult who knowingly, intentionally, or recklessly provides a firearm to a child, with or without remuneration, for any purpose other than for the purpose of attending a hunters safety course or a firearms safety course

or

for the purpose of engaging in practice in using a firearm for target shooting:

at an established range

or

in an area where the discharge of a firearm is:

not prohibited

or

supervised by:

a qualified firearms instructor

or

an adult who is supervising the person under age eighteen (18) while the person under age eighteen (18) is in the area

or

for the purpose of engaging in an organized competition involving the use of a firearm

or

for the purpose of the person under eighteen (18) participating in or practicing for a performance by an organized group under Section 501(c)(3) of the Internal Revenue Code that uses firearms as a part of a performance

or

for the purpose of the person under eighteen (18) hunting or trapping under a valid hunting trapping license issued to the person under age eighteen (18) under Ind. Code § 14-2-7

or

for the purpose of the person under eighteen (18) traveling with an unloaded firearm to or from (*specify Ind. Code § 35-47-10-1 activity listed above*)



or

having the firearm when the person under eighteen (18)

is on real property that is under control of the person's parent or an adult family member of the person or the person's legal guardian and

has permission to possess a firearm from the person's parent or an adult family member of the person or the person's legal guardian

or

having the firearm when the person under eighteen (18):

is at (his) (her) residence

and

has permission from:

[his] [her] parent

or

an adult member of [his] [her] family

or

[his] [her] legal guardian

to possess a firearm

commits dangerous control of a firearm, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when (he) (she) was eighteen (18) years of age or older
3. (knowingly) (intentionally) (recklessly)
4. provided a firearm to (*name child*)
5. when (*name child*) was under eighteen (18) years of age
6. for any purpose other than

for the purpose of (*name child*)'s attending a hunters safety course or a firearms safety course

or

for the purpose of (*name child*)'s engaging in practice in using a firearm for target shooting:

at an established range

or

in an area where the discharge of a firearm was:

{not prohibited}

{or}

{supervised by:

a qualified firearms instructor

or

an adult who would supervise (*name child*) while (*name child*) was at the place}

or

for the purpose of (*name child*)'s engaging in an organized competition involving the use of a firearm

or

for the purpose of (*name child*)'s participating in or practicing for a performance by an organized group under Section 501(c)(3) of the Internal Revenue Code that used firearms as a part of a performance

or

for the purpose of (*name child*)'s hunting or trapping under a valid hunting or trapping license issued to (*name child*) under Ind. Code § 14-2-7

or

for the purpose of (*name child*)'s traveling with an unloaded firearm to or from (*specify Ind. Code § 35-47-10-1 activity listed above*)

or

for the purpose of (*name child*)'s being on real property that was under control of (*name child*)'s parent

or

an adult member of (*name child*)'s family

or

(*name child*)'s legal guardian

and

with permission to possess a firearm from (*name child*)'s parent or an adult family member of (*name child*) or (*name child*)'s legal guardian

or

for the purpose of being at (*name child*)'s residence with permission from:

(*name child*)'s parent

or

an adult member of (*name child*)'s family

or

(*name child*)'s legal guardian

to possess a firearm.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of dangerous control of a firearm, a Class C felony.]

**Comments**

The terms "adult," "firearm" and "child" are defined by law. See I.C. 35-47-10-2, I.C. 35-7-1-5, I.C. 35-47-10-3; Instruction Nos. 14.08, 14.87 and 14.16A

Trial of this offense as a Class B felony due to a prior conviction must be bifurcated. See Chapter 15.

The statutory language ["provides a firearm to a child for any purpose other than a purpose described in section 1 of this chapter] indicates negating the list of purposes was meant to be an element for the State to prove, beyond a reasonable doubt.



**Instruction No. 7.39f. Dangerous Control of a Child.****I.C. 35-47-10-7.**

The crime of dangerous control of a child is defined by statute as follows:

A child's parent or legal guardian who knowingly, intentionally, or recklessly permits the child to possess a firearm [while aware of a substantial risk that the child will use the firearm to commit a felony and failing to make reasonable efforts to prevent the use of a firearm by the child to commit a felony] [or]

[when the child has been convicted of a crime of violence or has been adjudicated as a juvenile for an offense that would constitute a crime of violence if the child were an adult] commits dangerous control of a child, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. while in the relationship of [parent] [legal guardian] to [name child]
3. [knowingly] [intentionally]
4. permitted [name child] to possess a firearm
5. when [name child] was under eighteen (18) years of age and
6. [when Defendant

was aware of a substantial risk that (name child) would use the firearm to commit a felony, and

failed to make reasonable efforts to prevent (name child) from using the firearm to commit a felony]

[or]

[when (name child) had been (convicted of [specify alleged crime of violence], which was a crime of violence)

(or)

[had been adjudicated as a delinquent for an offense which would have been [specify alleged crime of violence], which would have been a crime of violence if committed by an adult)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of dangerous control of a child, a Class C felony.

**Comments**

The terms "adult," "firearm" and "child" are defined by law. *See* I.C. 35-47-10-2, I.C. 35-7-1-5, I.C. 35-47-10-3; Instruction Nos. 14.08, 14.87 and 14.16A.

Crimes of violence are listed in I.C. 35-50-1-2(a).

Trial of this crime as a Class B felony based on a prior conviction of the offense must be bifurcated. *See* Chapter 15.

**Instruction No. 7.41. Obtaining a Handgun or Firearm by False Information.**

**I.C. 35-47-2-17,**

**I.C. 35-47-2-23(b).**

The crime of obtaining a handgun by false information is defined by statute as follows:

No person, in purchasing or otherwise securing delivery of a firearm, or in applying for a license to carry a handgun, shall knowingly or intentionally give false information on a form required to (purchase or secure delivery of a firearm) (apply for a license to carry a handgun) or offer false evidence of identity. A person who violates this section commits a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. (in purchasing or otherwise securing delivery of a firearm)  
[or]  
(in applying for a license to carry a handgun]
3. (knowingly) (intentionally)
4. gave false information on a form required to (purchase or secure delivery of a firearm) (apply for a license to carry a handgun)]  
[or]  
[offered false evidence of identity].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of obtaining a handgun by false information, a Class C felony.

**Comments**

The terms “handgun” and “firearm” are defined by law. *See* I.C. 35-47-1-6 and I.C. 35-47-1-5; Instruction Nos. 14.101 and 14.87.



**Instruction No. 7.43. Using or Attempting to Use False or Altered Handgun License.**

**I.C. 35-47-2-22, I.C. 35-47-2-23(c).**

The crime of use of a false or altered handgun license is defined by statute as follows:

It is unlawful for any person to use, or to attempt to use, a false, counterfeit, spurious, or altered handgun-carrying license to obtain a handgun contrary to the provisions of this chapter. A person who violates this section commits a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. used, or attempted to use
3. [a false] [a counterfeit] [a spurious] [an altered] handgun-carrying license
4. to obtain a handgun
5. in a manner contrary to that provided by law
6. by [here specify the respect in which charge alleges statutory handgun process was avoided].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of the crime of using a false or altered handgun license, a Class A misdemeanor.

*(Text continued on page 7-75)*

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

2. The second part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

3. The third part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

4. The fourth part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

5. The fifth part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

6. The sixth part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

7. The seventh part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

8. The eighth part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

9. The ninth part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

10. The tenth part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

11. The eleventh part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

12. The twelfth part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

13. The thirteenth part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

14. The fourteenth part of the document is a letter from the President of the United States to the Congress, dated January 1, 1863.

**Comments**

A trial of this offense as a Class D felony must be bifurcated. See Chapter 15.

The term "handgun" is defined by law. See I.C. 35-47-1-6; Instruction No. 14.101.



**Instruction No. 7.45. Alteration, Removal or Obliteration of  
Identifying Marks of Handguns.**

**I.C. 35-47-2-18(1), I.C. 35-47-2-23(b).**

The crime of alteration, removal or obliteration of identifying marks on handguns is defined by statute as follows:

No person shall change, alter, remove or obliterate the name of the maker, model, manufacturer's serial number, or other mark of identification on any handgun. A person who violates this section commits a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [changed] [altered] [removed] [obliterated]
3. [the name of the maker]  
[or]  
[the model]  
[or]  
[the manufacturer's serial number]  
[or]  
[other mark of identification]
4. on a handgun.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of alteration, removal, or obliteration of identifying marks on a handgun, a Class C felony.

**Comments**

The term "handgun" is defined by law. See I.C. 35-47-1-6; Instruction No. 14.101.

**Instruction No. 7.47. Possession of an Altered Handgun.****I.C. 35-47-2-18(2), I.C. 35-47-2-23(b).**

The crime of possessing an altered handgun is defined by statute as follows:

No person shall possess any handgun on which the name of the maker, model, manufacturer's serial number, or other mark of identification has been changed, altered, removed or obliterated. A person who violates this section commits a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. possessed a handgun on which
3. [the name of the maker]  
[or]  
[the model]  
[or]  
[the manufacturer's serial number]  
[or]  
[other mark of identification]
4. had been [changed] [altered] [removed] [obliterated]
5. and Defendant knew of the [change] [alteration] [removal] [obliteration].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of an altered handgun, a Class C felony.



**Comments**

The term "handgun" is defined by law. See I.C. 35-47-1-6; Instruction No. 14.101.

\*The requirement of knowledge of the handgun's alteration was held to be required by *Wagerman v. State* (1992), Ind. App., 597 N.E.2d 13.

**Instruction No. 7.49. Improper Disposition of Confiscated Firearm.****I.C. 35-47-3-4.**

The crime of improper disposition of confiscated firearms is defined by law as follows:

A person who knowingly or intentionally delivers a confiscated firearm to a person convicted of a felony offense involving use of a firearm and which felony offense is the basis of the confiscation, delivers a confiscated firearm to another with knowledge that there is a rightful owner to whom the firearm must be returned, or fails to deliver a confiscated firearm to [the sheriff's department][a city or town police force][the state police department laboratory][a state or local forensic laboratory] for disposition after a determination that the rightful owner of the firearm cannot be ascertained, commits a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [delivered a confiscated firearm to (name) when the firearm had been confiscated from (name) and (name) had been convicted of a felony involving use of a firearm]

[or]

[delivered a confiscated firearm to (name) knowing that another person was the rightful owner of the firearm to whom the firearm should have been returned]

[or]

[failed to deliver a confiscated firearm to the [sheriff's department] [a city or town police force] [the state police department laboratory] [a state or local forensic laboratory] for disposition after a determination had been made that the identity of the rightful owner of the firearm could not be ascertained.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of improper disposition of confiscated firearms, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term "firearm" is defined by law. See I.C. 35-47-1-5; Instruction No. 14.87.



**Instruction No. 7.53. Dealing in a Sawed-Off Shotgun.****I.C. 35-47-5-4.1, I.C. 35-47-1-10.**

The crime of dealing in a sawed-off shotgun is defined by law as follows:

A person who manufactures, causes to be manufactured, imports into Indiana, keeps for sale, offers or exposes for sale, or gives, lends, or possesses any sawed-off shotgun commits dealing in a sawed-off shotgun, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [manufactured]  
[or]  
[caused to be manufactured]  
[or]  
[imported into Indiana]  
[or]  
[kept for sale]  
[or]  
[offered or exposed for sale]  
[or]  
[gave, lent, or possessed]
3. [a shotgun with (a barrel) (barrels) less than eighteen (18) inches in length]  
[or]  
[a weapon made from a shotgun (whether by alteration, modification, or otherwise) which as modified had an overall length of less than twenty-six (26) inches]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Dealing in a Sawed-Off Shotgun, a Class D felony, charged in Count \_\_\_\_\_.

**Comment**

The term "shotgun" is defined by law. See I.C. 35-47-1-10 and I.C. 35-47-1-11; Instruction Nos. 14.179 and 14.191. The instruction incorporates the statutory definition of "sawed-off shotgun" in I.C. 35-47-1-10.

The statute contains an exemption for a law enforcement officer acting in the course of official duties or for a person who manufactures for sale or sells a sawed-off shotgun to a law enforcement agency. The Defendant has the burden to prove the exemption applies, by a preponderance of the evidence. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001).

**Instruction No. 7.53(a). Inference of Possession.****I.C. 35-47-5-4.1(b).**

The presence of a sawed-off shotgun in a motor vehicle may create an inference that the weapon was in possession of all persons in the vehicle. [There is no such inference if the weapon was found on or under the control of one of the occupants.] [The inference does not apply to a duly licensed driver of a motor vehicle for hire who finds the weapon in that vehicle in the proper pursuit of the driver's trade.]

An inference never relieves the State of its burden of proof. You may accept the inference or reject it.



**Instruction No. 7.55. Ownership or Possession of a Machine Gun.****I.C. 35-47-5-8.**

The crime of ownership or possession of a machine gun is defined by law as follows:

A person who owns or possesses a machine gun commits a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. owned or possessed
4. a machine gun.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of ownership or possession of a machine gun, a Class C felony, charged in Count \_\_\_\_\_.

### Comments

The term "machine gun" is defined by law. See I.C. 35-41-1-18.3; Instruction No.14.126.

I.C. 35-47-5-10 contains a list of persons to whom the crime above does not apply. The Committee believes that this list constitutes "exceptions" or "exemptions" which the Defendant has the burden to prove, by a preponderance of the evidence. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The list follows:

The provisions of section 8 or 9 [IC 35-47-5-8 or IC 35-47-5-9] of this chapter shall not be construed to apply to any of the following:

(1) Members of the military or naval forces of the United States, National Guard of Indiana, or Indiana State Guard, when on duty or practicing.

(2) Machine guns kept for display as relics and which are rendered harmless and not usable.

(3) Any of the law enforcement officers of this state or the United States while acting in the furtherance of their duties.

(4) Persons lawfully engaged in the display, testing, or use of fireworks.

(5) Agencies of state government.

(6) Persons permitted by law to engage in the business of manufacturing, assembling, conducting research on, or testing machine guns, airplanes, tanks, armored vehicles, or ordnance equipment or supplies while acting within the scope of such business.

(7) Persons possessing, or having applied to possess, machine guns under applicable United States statutes. Such machine guns must be transferred as provided in this article.

(8) Persons lawfully engaged in the manufacture, transportation, distribution, use or possession of any material, substance, or device for the sole purpose of industrial, agricultural, mining, construction, educational, or any other lawful use.

**Instruction No. 7.57. Operation of a Loaded Machine Gun.**

**I.C. 35-47-5-9.**

The crime of operation of a loaded machine gun is defined as follows:

A person who operates a loaded machine gun commits a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. operated a loaded machine gun.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of operation of a loaded machine gun, a Class B felony, charged in Count \_\_\_\_\_.



### Comments

The term "machine gun" is defined by law. See I.C. 35-41-1-18.3; Instruction No.14.126.

I.C. 35-47-5-10 contains a list of persons to whom the crime above does not apply. The Committee believes that this list constitutes "exceptions" or "exemptions" which the Defendant has the burden to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The list follows:

The provisions of section 8 or 9 [IC 35-47-5-8 or IC 35-47-5-9] of this chapter shall not be construed to apply to any of the following:

(1) Members of the military or naval forces of the United States, National Guard of Indiana, or Indiana State Guard, when on duty or practicing.

(2) Machine guns kept for display as relics and which are rendered harmless and not usable.

(3) Any of the law enforcement officers of this state or the United States while acting in the furtherance of their duties.

(4) Persons lawfully engaged in the display, testing, or use of fireworks.

(5) Agencies of state government.

(6) Persons permitted by law to engage in the business of manufacturing, assembling, conducting research on, or testing machine guns, airplanes, tanks, armored vehicles, or ordnance equipment or supplies while acting within the scope of such business.

(7) Persons possessing, or having applied to possess, machine guns under applicable United States statutes. Such machine guns must be transferred as provided in this article.

(8) Persons lawfully engaged in the manufacture, transportation, distribution, use or possession of any material, substance, or device for the sole purpose of industrial, agricultural, mining, construction, educational, or any other lawful use.

**Instruction No. 7.59. Possession of a Deadly Weapon When Boarding Aircraft.****I.C. 35-47-6-1.**

The crime of a possession of a deadly weapon when boarding aircraft is defined by law as follows:

A person who boards a commercial or charter aircraft having in his possession a firearm, an explosive, or any other deadly weapon commits a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. boarded a commercial or charter aircraft
4. while possessing
  - [a firearm]
  - [or]
  - [an explosive]
  - [or]
  - [any deadly weapon.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a deadly weapon when boarding aircraft, a Class C felony, charged in Count \_\_\_\_\_

**Comments**

The terms "deadly weapon" and "firearm" are defined by law. See I.C. 35-41-1-8 and I.C. 35-47-1-5; Instruction Nos. 14.49 and 14.87.



**Instruction No. 7.61. Pointing a Firearm—Class D felony.****I.C. 35-47-4-3.**

The crime of pointing a firearm is defined by law as follows:

A person who knowingly or intentionally points a firearm at another person commits a Class D felony. [The offense is a Class A misdemeanor if the firearm was not loaded.]

*[(Note to Judge: give following paragraph and the other bracketed language below if evidence raises any inference that the firearm was not loaded)]* The fact that the firearm was not loaded is a mitigating factor which reduces the offense from a Class D felony to a Class A misdemeanor. The State has the burden to prove beyond a reasonable doubt that the firearm was loaded.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. pointed a firearm
4. at [name].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of pointing a firearm, a class D felony, charged in Count \_\_\_\_\_

[If the State did prove each of these elements beyond a reasonable doubt, but the State failed to prove beyond a reasonable doubt that the firearm was loaded, you may find the Defendant guilty of pointing a firearm, a class A misdemeanor.

If the State did prove each of these elements beyond a reasonable doubt, and the State further proved beyond a reasonable doubt that the firearm was loaded, you may find the Defendant guilty of pointing a firearm, a Class D felony.]

**Comments**

The term "firearm" is defined by law. *See* I.C. 35-47-1-5; Instruction No. 14.87.

The Indiana Supreme Court has held that the fact that the gun was unloaded is a mitigating factor which reduces pointing a firearm from a Class D felony to a Class A misdemeanor:

We agree ... that the fact that a gun is unloaded is a mitigating factor that reduces a defendant's culpability from a felony to a misdemeanor, not an affirmative defense.

... [T]he defendant bears no burden of proof with respect to the mitigating factor of sudden heat, only the burden of placing the issue in question where the State's evidence has not done so. [Citations omitted.] The State then assumes the burden of disproving the existence of sudden heat beyond a reasonable doubt. [Citation omitted.] We hold the same rule applies with respect to Class A Misdemeanor Pointing a Firearm. That is, if a defendant charged with Class D

Felony Pointing a Firearm seeks instead to be convicted of Class A Misdemeanor Pointing a Firearm, the defendant must place the fact of the gun having been unloaded at issue if the State's evidence has not done so. Once at issue, the State must then prove beyond a reasonable doubt that the firearm was loaded.

*Adkins v. State*, 887 N.E.2d 934, 938-39 (Ind. 2008).

Subsection (a) of the pointing a firearm statute, I.C. 35-47-4-3, states that the pointing offense “does not apply” to either

- a law enforcement officer acting within the scope of official duties or
- a person who was justified in using reasonable force against another person.

The “does not apply” language, standing alone, would suggest that the “official duties” and “reasonable force” would have to be proven by the Defendant, under the doctrine for exceptions or exemptions recognized in Indiana caselaw. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). But the firearm statute also refers to the statutory citations for the *defenses* of reasonable force and law enforcement official duties, and so the Committee concludes that the General Assembly did not intend for these defenses to operate in this statute as exceptions. It is the Committee's conclusion that the burden was intended to rest on the State to disprove these two defenses beyond a reasonable doubt, and the Committee recommends including them, when evidence to support them is presented, as an element for the State to disprove. See Chapter 9 on Defenses.

(Text continued on page 7-93)



**Instruction No. 7.62. Possession of a Firearm in Violation of I.C. 35-47-4-5.**

**I.C. 35-47-4-5.**

The crime of possession of a firearm [in violation of I.C. 35-47-4-5]\* is defined by law as follows:

A person who knowingly or intentionally possesses a firearm after having been convicted of and sentenced for [an offense enumerated under I.C. 35-47-4-5] [an offense in any other jurisdiction if the elements of the other jurisdiction's crime for which the conviction was entered are substantially similar to the elements of an Indiana offense enumerated under I.C. 35-47-4-5] commits possession of a firearm in violation of I.C. 35-47-4-5, a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. knowingly or intentionally;
3. possessed a firearm;
4. after the Defendant had been convicted of

[the Indiana offense of *insert name of alleged prior*, which the Court instructs you is an offense enumerated under I.C. 35-47-4-5\*\*]

[or]

[the *insert name of alleged jurisdiction* crime of *insert name of alleged crime*, which the Court instructs you is substantially similar to an Indiana crime enumerated under I.C. 35-47-4-5\*\*].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a firearm in violation of I.C. 35-47-4-5.

**Comments**

The term "firearm" is defined by law. See I.C. 35-47-1-5; Instruction No. 14.87.

The crimes enumerated as the bases for prior conviction status under I.C. 35-47-4-5 are:

murder (I.C. 35-42-1-1); voluntary manslaughter (I.C. 35-42-1-



3); reckless homicide not committed by means of a vehicle (I.C. 35-42-1-5); battery as a Class A felony (I.C. 35-42-2-1(a)(5); battery as a Class B felony (I.C. 35-42-2-1(a)(4)) or Class C felony (I.C. 35-42-2-1(a)(3)); aggravated battery (I.C. 35-42-2-1.5); kidnapping (I.C. 35-42-3-2); criminal confinement (I.C. 35-42-3-3); rape (I.C. 35-42-4-1); criminal deviate conduct (I.C. 35-42-4-2); child molesting (I.C. 35-42-4-3); sexual battery as a Class C felony (I.C. 35-42-4-8); robbery (I.C. 35-42-5-1); carjacking (I.C. 35-42-5-2); arson as a Class A felony or Class B felony (I.C. 35-43-1-1(a)); burglary as a Class A felony or Class B felony (I.C. 35-43-2-1); assisting a criminal as a Class C felony (I.C. 35-44-3-2); resisting law enforcement as a Class B felony or Class C felony (I.C. 35-44-3-3); escape as a Class B felony or Class C felony (I.C. 35-44-3-5); trafficking with an inmate as a Class C felony (I.C. 35-44-3-9); criminal gang intimidation (I.C. 35-45-9-4); stalking as a Class B felony or Class C felony (I.C. 35-45-10-5); incest (I.C. 35-46-1-3); dealing in or manufacturing cocaine, a narcotic drug or methamphetamine (I.C. 35-48-4-1); dealing in a schedule I, II, or III controlled substance (I.C. 35-48-4-2); dealing in a schedule IV controlled substance (I.C. 35-48-4-3); or dealing in a schedule V controlled substance (I.C. 35-48-4-4).

The statute also includes any conviction for attempting to commit or conspiring to commit any one of these listed felonies.

**\*\*Whether the alleged prior is one enumerated under I.C. 35-47-4-5 and hence a "serious violent felony" and whether an alleged prior from another jurisdiction is "substantially similar" to an Indiana offense which is a "serious violent felony" are questions of law for the court, not fact questions for the jury. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance"); *Mann v. State*, 754 N.E.2d 544 (Ind. Ct. App. 2001) (whether Ohio prior conviction was "substantially similar" to Indiana operating while intoxicated offense, and hence a "previous conviction of operating while intoxicated," was not an issue for the jury; "the trial court should have taken judicial notice of the Ohio statute and determined that the statute was substantially similar to Indiana's OWI statutes").**

It has been held that bifurcating the trial of the felon status of

this crime is not possible, because the Defendant's felon status is an element of the basic offense. *Spearman v. State*, 744 N.E.2d 545 (Ind. Ct. App. 2001) ("we hold that the element of the prior felony cannot be bifurcated from the possession element"), *transfer denied*. A subsequent decision used language suggesting that bifurcation is not prohibited. *Imel v. State*, 830 N.E.2d 913 (Ind. Ct. App. 2005) ("[w]e also determined in *Spearman* that one who was tried solely for the crime of Unlawful Possession of a Firearm by a Serious Violent Felon was not entitled to have the proceedings bifurcated"). Most recently, a decision approved of bifurcation. *Williams v. State*, 834 N.E.2d 225, 227 (Ind. Ct. App. 2005) ("we note our approval here of the trial court having bifurcated the trial so as to avoid any labeling of Williams as a 'serious violent felon' until after the jury had decided whether he had in fact possessed the AK-47").

*Spearman* urged trial courts to use instruction language which minimizes prejudicial references to the Defendant as a "serious violent felon" and to the prior felony as a "serious violent felony." The "felony enumerated under IC 35-47-4-5" language in the instruction above was suggested in *Spearman*, 744 N.E.2d. at 550, n. 8, and similar phrases have been used elsewhere in the instruction.

(Text continued on page 7-95)



The first part of the document is a letter from the President of the United States to the Congress. In this letter, the President discusses the state of the Union and the challenges facing the country. He mentions the economic recovery, the ongoing military operations, and the importance of education and healthcare. The letter is signed by Barack Obama.

The second part of the document is a report from the Department of Justice. It details the progress of the investigation into the activities of the National Security Agency (NSA) and the Federal Bureau of Investigation (FBI). The report highlights the findings of the investigation and the steps being taken to address the issues identified.

The third part of the document is a statement from the Secretary of the Department of Education. It discusses the results of the National Assessment of Educational Progress (NAEP) and the impact of the stimulus package on the education system. The statement emphasizes the commitment to improving the quality of education for all students.

The fourth part of the document is a report from the Department of the Interior. It describes the progress of the reforestation efforts in the western United States and the impact of the drought on the wildlife population. The report also discusses the plans for the upcoming year and the need for continued support from the public.

The fifth part of the document is a statement from the Secretary of the Department of Health and Human Services. It discusses the progress of the Affordable Care Act (ACA) and the impact of the recession on the health care system. The statement highlights the efforts to expand access to health care and the importance of maintaining the ACA.

The sixth part of the document is a report from the Department of Agriculture. It details the progress of the farm bill and the impact of the drought on the agricultural sector. The report also discusses the plans for the upcoming year and the need for continued support from the public.



**Instruction No. 7.63. Unlawful use of body armor.****IC. 35-47-5-13.**

The crime of unlawful use of body armor is defined by law as follows:

A person who knowingly or intentionally uses body armor, defined as bullet resistant metal or other material worn by a person to provide protection from weapons or bodily injury, while committing a felony commits unlawful use of body armor, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. used body armor
4. while committing [state felony alleged], a felony, defined as [state elements of felony alleged]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of unlawful use of body armor, a Class D felony, charged in Count \_\_\_\_\_.

**Instruction No. 7.65. Terrorism.****I.C. 35-47-12-1.**

The crime of terrorism is defined as follows:

A person who knowingly or intentionally possess, manufactures, places, disseminates, or detonates a weapon of mass destruction with the intent to carry out terrorism commits a Class B felony. The offense is a Class A felony if the conduct results in serious bodily injury or death of any person.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [possessed] [manufactured] [placed] [disseminated] [detonated]
4. a weapon of mass destruction
5. with the intent to carry out terrorism
6. (for Class A felony) and the offense resulted in (serious bodily injury) (death) to (name).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of terrorism, a Class B/A felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "serious bodily injury," "terrorism" and "weapon of mass destruction" are defined by law. See I.C. 35-41-1-25, 35-41-1-26.5, 35-41-1-29.5; Instruction Nos. 14.185, 14.202c and 14.216a.



**Instruction No. 7.67. Agricultural Terrorism.****I.C. 35-47-12-2.**

The crime of agricultural terrorism is defined as follows:

A person who knowingly or intentionally possesses, manufactures, places, disseminates, or detonates a weapon of mass destruction with the intent to damage, destroy, sicken, or kill crops or livestock of another person without the consent of the other person commits agricultural terrorism, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [possessed] [manufactured] [placed] [disseminated] [deonated]
4. a weapon of mass destruction
5. with the intent to damage, destroy, sicken, or kill
6. [crops] [livestock] of another person without the consent of the other person.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of agricultural terrorism, a Class C felony, charged in Count \_\_\_\_\_.

**Comments**

The term "weapon of mass destruction" is defined by law. See I.C. 35-41-1-29.5; Instruction No. 4.216a.

**Instruction No. 7.69. Terroristic Mischief.****I.C. 35-47-12-3.**

The crime of terroristic mischief is defined as follows:

A person who knowingly or intentionally places or disseminates a device or substance with the intent to cause a reasonable person to believe that the device or substance is a weapon of mass destruction commits terroristic mischief, a Class C felony. The offense is a Class B felony, if as a result of the terroristic mischief, a physician prescribes diagnostic testing or medical treatment for any person other than the person who committed the terroristic mischief, or a person suffers serious bodily injury.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [placed] [disseminated]
4. a device or substance
5. with the intent to cause a reasonable person to believe that the device or substance was a weapon of mass destruction
- [6. (for Class B felony) and as a result of Defendant's conduct:  
[a physician prescribed (diagnostic testing) (medical treatment)  
for any person other than the Defendant]  
[or]  
[(name), a person, suffered serious bodily injury].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of terroristic mischief, a Class C/B felony, charged in Count \_\_\_\_\_.



**Comments**

The terms "serious bodily injury," "terrorism" and "weapon of mass destruction" are defined by law. See I.C. 35-41-1-25, 35-41-1-26.5, 35-41-1-29.5; Instruction Nos. 14.185, 14.202c and 14.216a.

**Instruction No. 7.71. Possession of Destructive Device.****I.C. 35-47.5-5-2.**

The crime of unauthorized [possession] [manufacture] [transportation] [distribution] [possession with intent to distribute] [offering to distribute] a destructive device is defined as follows:

A person who knowingly or intentionally [possesses] [manufactures] [transports] [distributes] [possesses with the intent to distribute] [offers to distribute] a destructive device, unless authorized by law, commits a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [possessed]  
[or]  
[manufactured]  
[or]  
[transported]  
[or]  
[distributed]  
[or]  
[possessed with the intent to distribute]  
[or]  
[offered to distribute]
4. a destructive device.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [possession] [manufacture] [transportation] [distribution] [possession with intent to distribute] [offering to distribute] a destructive device, a Class C felony, charged in Count \_\_\_\_\_.



### Comments

The terms "destructive device" and "distribute" are defined by law. See I.C. 35-47.5-2-4 and 35-47.5-2-6; Instruction Nos. 14.56 and 14.67.

I.C. 35-47.5-5-1 contains a list of exemptions to which the offense above "does not apply." These exemptions in the statute are, in the Committee's opinion, the Defendant's to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The exemptions are:

(1) A person authorized to manufacture, possess, transport, distribute, or use a destructive device or detonator under the laws of the United States, as amended, or under Indiana law when the person is acting in accordance with the laws, regulations, and rules issued under federal or Indiana law.

(2) A person who is issued a permit for blasting or surface coal mining by the director of the department of natural resources under IC 14-34 when the person is acting under the laws and rules of Indiana and any ordinances and regulations of the political subdivision or authority of the state where blasting or mining operations are being performed.

(3) Fireworks (as defined in IC 22-11-14-1) and a person authorized by the laws of Indiana and of the United States to manufacture, possess, distribute, transport, store, exhibit, display, or use fireworks.

(4) A law enforcement agency, a fire service agency, or an emergency management agency of Indiana, an agency or an authority of a political subdivision of the state or the United States, and an employee or authorized agent of the United States while in performance of official duties.

(5) A law enforcement officer, a fire official, or an emergency management official of the United States or any other state if that person is attending training in Indiana.

(6) The armed forces of the United States or of Indiana.

(7) Research or educational programs conducted by or on behalf of a college, university, or secondary school that are:

(A) authorized by the chief executive officer of the educational institution or the officer's designee; or

(B) conducted under the policy of the educational institution; and conducted in accordance with the laws of the United States and Indiana.

(8) The use of explosive materials in medicines and medicinal agents in forms prescribed by the most recent published edition of the official United States Pharmacopoeia or the National Formulary.

(9) Small arms ammunition and reloading components of small arms ammunition.

(10) Commercially manufactured black powder in quantities not to exceed fifty (50) pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or antique devices.

(11) An explosive that is lawfully possessed for use in legitimate agricultural or business activities.



**Instruction No. 7.73. Possession of Regulated Explosive.****I.C. 35-47.5-5-3.**

The crime of [possession] [manufacture] [transportation] [distribution] [possession with intent to distribute] [offering to distribute] a regulated explosive by a felon is defined as follows:

A person who has been convicted of a felony by an Indiana court or a court of any other state, the United States, or another country and knowingly or intentionally [possesses] [manufactures] [transports] [distributes] [possesses with intent to distribute] [offers to distribute] a regulated explosive commits a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [possessed]  
[or]  
[manufactured]  
[or]  
[transported]  
[or][distributed]  
[or]  
[possessed with the intent to distribute]  
[or]  
[offered to distribute]
4. a regulated explosive
5. after the Defendant had been convicted of a felony by [*specify state, federal or other country*].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [possession] [manufacture] [transportation] [distribution] [possession with intent to distribute] [offering to distribute] a regulated explosive, a Class C felony.

### Comments

The terms "distribute" and "regulated explosive" are defined by law. See I.C. 35-47.5-2-6 and 35-47.5-2-13; Instruction Nos. 14.67 and 14.177A.

Trial of this offense as a Class B felony must be bifurcated. See Instruction No. 15.76a. Defendant's basic felon status is an essential element of the offense and therefore must, based on *Spearman v. State*, 744 N.E.2d 545 (Ind. App. 2001), *transfer denied*, be tried in this first phase of the trial. The Committee believes the issue of the prior unrelated conviction of the same offense should be tried separately.

I.C. 35-47.5-5-1 contains a list of exemptions to which the offense above "does not apply." These exemptions in the statute are, in the Committee's opinion, the Defendant's to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The exemptions are:

- (1) A person authorized to manufacture, possess, transport, distribute, or use a destructive device or detonator under the laws of the United States, as amended, or under Indiana law when the person is acting in accordance with the laws, regulations, and rules issued under federal or Indiana law.
- (2) A person who is issued a permit for blasting or surface coal mining by the director of the department of natural resources under IC 14-34 when the person is acting under the laws and rules of Indiana and any ordinances and regulations of the political subdivision or authority of the state where blasting or mining operations are being performed.
- (3) Fireworks (as defined in IC 22-11-14-1) and a person authorized by the laws of Indiana and of the United States to manufacture, possess, distribute, transport, store, exhibit, display, or use fireworks.
- (4) A law enforcement agency, a fire service agency, or an emergency management agency of Indiana, an agency or an authority of a political subdivision of the state or the United States, and an employee or authorized agent of the United States while in performance of official duties.
- (5) A law enforcement officer, a fire official, or an emergency management official of the United States or any other state if that person is attending training in Indiana.
- (6) The armed forces of the United States or of Indiana.
- (7) Research or educational programs conducted by or on behalf of a college, university, or secondary school that are:
  - (A) authorized by the chief executive officer of the educational institution or the officer's designee; or
  - (B) conducted under the policy of the educational institution; and conducted in accordance with the laws of the United States and Indiana.
- (8) The use of explosive materials in medicines and medicinal agents in forms prescribed by the most recent published edition of the official United States Pharmacopoeia or the National Formulary.
- (9) Small arms ammunition and reloading components of small arms ammunition.
- (10) Commercially manufactured black powder in quantities not to exceed fifty (50) pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or antique devices.
- (11) An explosive that is lawfully possessed for use in legitimate agricultural or business activities.



**Instruction No. 7.75. Distribution of Regulated Explosive to a Felon.**

**I.C. 35-47.5-5-4.**

The crime of distribution of a regulated explosive to a felon is defined as follows:

A person who knowingly or intentionally distributes a regulated explosive to a person who has been convicted of a felony by [an Indiana court] [a court of another state] [the United States] [another country] commits a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. distributed
4. a regulated explosive
5. to [name], when [name] had been convicted of a felony by [an Indiana court] [a court of another state] [the United States] [another country].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of distribution of a regulated explosive to a felon, a Class C felony, charged in Count \_\_\_\_\_.



**Comments**

The terms "distribute" and "regulated explosive" are defined by law. See I.C. 35-47.5-2-6 and 35-47.5-2-13; Instruction Nos. 14.67 and 14.177A.

I.C. 35-47.5-5-1 contains a list of exemptions to which the offense above "does not apply." These exemptions in the statute are, in the Committee's opinion, the Defendant's to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The exemptions are:

(1) A person authorized to manufacture, possess, transport, distribute, or use a destructive device or detonator under the laws of the United States, as amended, or under Indiana law when the person is acting in accordance with the laws, regulations, and rules issued under federal or Indiana law.

(2) A person who is issued a permit for blasting or surface coal mining by the director of the department of natural resources under IC 14-34 when the person is acting under the laws and rules of Indiana and any ordinances and regulations of the political subdivision or authority of the state where blasting or mining operations are being performed.

(3) Fireworks (as defined in IC 22-11-14-1) and a person authorized by the laws of Indiana and of the United States to manufacture, possess, distribute, transport, store, exhibit, display, or use fireworks.

(4) A law enforcement agency, a fire service agency, or an emergency management agency of Indiana, an agency or an authority of a political subdivision of the state or the United States, and an employee or authorized agent of the United States while in performance of official duties.

(5) A law enforcement officer, a fire official, or an emergency management official of the United States or any other state if that person is attending training in Indiana.

(6) The armed forces of the United States or of Indiana.

(7) Research or educational programs conducted by or on behalf of a college, university, or secondary school that are:

(A) authorized by the chief executive officer of the educational institution or the officer's designee; or

(B) conducted under the policy of the educational institution; and conducted in accordance with the laws of the United States and Indiana.

(8) The use of explosive materials in medicines and medicinal agents in forms prescribed by the most recent published edition of the official United States Pharmacopoeia or the National Formulary.

(9) Small arms ammunition and reloading components of small arms ammunition.

(10) Commercially manufactured black powder in quantities not to exceed fifty (50) pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or antique devices.

(11) An explosive that is lawfully possessed for use in legitimate agricultural or business activities.

**Instruction No. 7.77. Distribution of Explosive to a Minor.****I.C. 35-47.5-5-5.**

The crime of distribution of an explosive to a minor is defined by statute as follows:

A person who knowingly or intentionally distributes or offers to distribute [a destructive device] [an explosive] [a detonator] to a person who is less than eighteen (18) years of age commits a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [distributed] [offered to distribute]
4. [a destructive device] [an explosive] [a detonator]
5. to [name minor] when [name minor] was less than eighteen (18) years of age.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of distribution of an explosive to a minor, a Class B felony, charged in Count \_\_\_\_\_.



**Comments**

The terms "destructive device," "detonator," "distribute," and "explosive" are defined by law. See I.C. 35-47.5-2-4, 35-47.5-2-5, 35-47.5-2-6, and 35-47.5-2-7; Instruction Nos. 14.56, 14.56A, 14.67, and 14.82.

I.C. 35-47.5-5-1 contains a list of exemptions to which the offense above "does not apply." These exemptions in the statute are, in the Committee's opinion, the Defendant's to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The exemptions are:

(1) A person authorized to manufacture, possess, transport, distribute, or use a destructive device or detonator under the laws of the United States, as amended, or under Indiana law when the person is acting in accordance with the laws, regulations, and rules issued under federal or Indiana law.

(2) A person who is issued a permit for blasting or surface coal mining by the director of the department of natural resources under IC 14-34 when the person is acting under the laws and rules of Indiana and any ordinances and regulations of the political subdivision or authority of the state where blasting or mining operations are being performed.

(3) Fireworks (as defined in IC 22-11-14-1) and a person authorized by the laws of Indiana and of the United States to manufacture, possess, distribute, transport, store, exhibit, display, or use fireworks.

(4) A law enforcement agency, a fire service agency, or an emergency management agency of Indiana, an agency or an authority of a political subdivision of the state or the United States, and an employee or authorized agent of the United States while in performance of official duties.

(5) A law enforcement officer, a fire official, or an emergency management official of the United States or any other state if that person is attending training in Indiana.

(6) The armed forces of the United States or of Indiana.

(7) Research or educational programs conducted by or on behalf of a college, university, or secondary school that are:

(A) authorized by the chief executive officer of the educational institution or the officer's designee; or

(B) conducted under the policy of the educational institution; and conducted in accordance with the laws of the United States and Indiana.

(8) The use of explosive materials in medicines and medicinal agents in forms prescribed by the most recent published edition of the official United States Pharmacopoeia or the National Formulary.

(9) Small arms ammunition and reloading components of small arms ammunition.

(10) Commercially manufactured black powder in quantities not to exceed fifty (50) pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or antique devices.

(11) An explosive that is lawfully possessed for use in legitimate agricultural or business activities.



**Instruction No. 7.79. Hoax Devices.****I.C. 35-47.5-5-6.**

The crime of unlawful conduct with a hoax device is defined as follows:

A person who [manufactures] [possesses] [transports] [distributes] [uses] a hoax device or replica with the intent to cause another to believe that the hoax device or replica is a destructive device or detonator commits a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [manufactured] [possessed] [transported] [distributed] [used]
3. a hoax device or replica
4. with the intent to cause another to believe that the hoax device or replica was a destructive device or detonator.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of illegal conduct with a hoax device, a Class D felony, charged in Count \_\_\_\_\_.

### Comments

The terms “destructive device,” “detonator,” and “hoax device or replica” are defined by law. See I.C. 35-47.5-2-4, 35-47.5-2-5, and 35-47.5-2-8; Instruction Nos. 14.56, 14.56A, and 14.106A.

I.C. 35-47.5-5-1 contains a list of exemptions to which the offense above “does not apply.” These exemptions in the statute are, in the Committee’s opinion, the Defendant’s to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The exemptions are:

(1) A person authorized to manufacture, possess, transport, distribute, or use a destructive device or detonator under the laws of the United States, as amended, or under Indiana law when the person is acting in accordance with the laws, regulations, and rules issued under federal or Indiana law.

(2) A person who is issued a permit for blasting or surface coal mining by the director of the department of natural resources under IC 14-34 when the person is acting under the laws and rules of Indiana and any ordinances and regulations of the political subdivision or authority of the state where blasting or mining operations are being performed.

(3) Fireworks (as defined in IC 22-11-14-1) and a person authorized by the laws of Indiana and of the United States to manufacture, possess, distribute, transport, store, exhibit, display, or use fireworks.

(4) A law enforcement agency, a fire service agency, or an emergency management agency of Indiana, an agency or an authority of a political subdivision of the state or the United States, and an employee or authorized agent of the United States while in performance of official duties.

(5) A law enforcement officer, a fire official, or an emergency management official of the United States or any other state if that person is attending training in Indiana.

(6) The armed forces of the United States or of Indiana.

(7) Research or educational programs conducted by or on behalf of a college, university, or secondary school that are:

(A) authorized by the chief executive officer of the educational institution or the officer’s designee; or

(B) conducted under the policy of the educational institution; and conducted in accordance with the laws of the United States and Indiana.

(8) The use of explosive materials in medicines and medicinal agents in forms prescribed by the most recent published edition of the official United States Pharmacopoeia or the National Formulary.

(9) Small arms ammunition and reloading components of small arms ammunition.

(10) Commercially manufactured black powder in quantities not to exceed fifty (50) pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or antique devices.

(11) An explosive that is lawfully possessed for use in legitimate agricultural or business activities.



**Instruction No. 7.81. Hindering Destructive Device Response.****I.C. 35-47.5-5-7.**

The crime of unlawful hindering or obstructing of destructive device response is defined as follows:

A person who knowingly or intentionally hinders or obstructs a law enforcement officer, fire official, emergency management official, animal trained to detect destructive devices, or robot or mechanical device designed or used by a law enforcement officer, fire official, or emergency management official of Indiana or of the United States in the detection, disarming, or destruction of a destructive device commits a Class B felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. hindered or obstructed
4. [a law enforcement officer] [a fire official] [an emergency management official] [an animal trained to detect destructive devices] [a robot or mechanical device designed or used by a law enforcement officer, fire official, or emergency management official of Indiana or of the United States]
4. in the [detection] [disarming] [destruction] of a destructive device.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of hindering destructive device response, a Class B felony, charged in Count \_\_\_\_\_.



**Comments**

The term "destructive device" is defined by law. See I.C. 35-47.5-2-4; Instruction No. 14.56.

I.C. 35-47.5-5-1 contains a list of exemptions to which the offense above "does not apply." These exemptions in the statute are, in the Committee's opinion, the Defendant's to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The exemptions are:

- (1) A person authorized to manufacture, possess, transport, distribute, or use a destructive device or detonator under the laws of the United States, as amended, or under Indiana law when the person is acting in accordance with the laws, regulations, and rules issued under federal or Indiana law.
- (2) A person who is issued a permit for blasting or surface coal mining by the director of the department of natural resources under IC 14-34 when the person is acting under the laws and rules of Indiana and any ordinances and regulations of the political subdivision or authority of the state where blasting or mining operations are being performed.
- (3) Fireworks (as defined in IC 22-11-14-1) and a person authorized by the laws of Indiana and of the United States to manufacture, possess, distribute, transport, store, exhibit, display, or use fireworks.
- (4) A law enforcement agency, a fire service agency, or an emergency management agency of Indiana, an agency or an authority of a political subdivision of the state or the United States, and an employee or authorized agent of the United States while in performance of official duties.
- (5) A law enforcement officer, a fire official, or an emergency management official of the United States or any other state if that person is attending training in Indiana.
- (6) The armed forces of the United States or of Indiana.
- (7) Research or educational programs conducted by or on behalf of a college, university, or secondary school that are:
  - (A) authorized by the chief executive officer of the educational institution or the officer's designee; or
  - (B) conducted under the policy of the educational institution; and conducted in accordance with the laws of the United States and Indiana.
- (8) The use of explosive materials in medicines and medicinal agents in forms prescribed by the most recent published edition of the official United States Pharmacopoeia or the National Formulary.
- (9) Small arms ammunition and reloading components of small arms ammunition.
- (10) Commercially manufactured black powder in quantities not to exceed fifty (50) pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or antique devices.
- (11) An explosive that is lawfully possessed for use in legitimate agricultural or business activities.

**Instruction No. 7.83. Possessing or Detonating Destructive Device****I.C. 35-47.5-5-8.**

The crime of [possessing] [transporting] [receiving] [placing] [detonating] a destructive device or explosive is defined as follows:

A person who [possesses] [transports] [receives] [places] [detonates] a destructive device or explosive with the knowledge or intent that it will be used to kill, injure, or intimidate an individual or destroy property commits a Class A felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [possessed] [transported] [received] [placed] [detonated]
3. [a destructive device] [an explosive]
4. with the knowledge or intent that it would be used to [kill, injure, or intimidate an individual] [destroy property].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [possessing] [transporting] [receiving] [placing] [detonating] a destructive device or explosive, a Class A felony, charged in Count \_\_\_\_\_.



### Comments

The terms “destructive device” and “explosives” are defined by law. See I.C. 35-47.5-2-4, 35-47.5-2-7; Instruction Nos. 14.56, 14.82.

I.C. 35-47.5-5-1 contains a list of exemptions to which the offense above “does not apply.” These exemptions in the statute are, in the Committee’s opinion, the Defendant’s to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The exemptions are:

(1) A person authorized to manufacture, possess, transport, distribute, or use a destructive device or detonator under the laws of the United States, as amended, or under Indiana law when the person is acting in accordance with the laws, regulations, and rules issued under federal or Indiana law.

(2) A person who is issued a permit for blasting or surface coal mining by the director of the department of natural resources under IC 14-34 when the person is acting under the laws and rules of Indiana and any ordinances and regulations of the political subdivision or authority of the state where blasting or mining operations are being performed.

(3) Fireworks (as defined in IC 22-11-14-1) and a person authorized by the laws of Indiana and of the United States to manufacture, possess, distribute, transport, store, exhibit, display, or use fireworks.

(4) A law enforcement agency, a fire service agency, or an emergency management agency of Indiana, an agency or an authority of a political subdivision of the state or the United States, and an employee or authorized agent of the United States while in performance of official duties.

(5) A law enforcement officer, a fire official, or an emergency management official of the United States or any other state if that person is attending training in Indiana.

(6) The armed forces of the United States or of Indiana.

(7) Research or educational programs conducted by or on behalf of a college, university, or secondary school that are:

(A) authorized by the chief executive officer of the educational institution or the officer’s designee; or

(B) conducted under the policy of the educational institution; and conducted in accordance with the laws of the United States and Indiana.

(8) The use of explosive materials in medicines and medicinal agents in forms prescribed by the most recent published edition of the official United States Pharmacopoeia or the National Formulary.

(9) Small arms ammunition and reloading components of small arms ammunition.

(10) Commercially manufactured black powder in quantities not to exceed fifty (50) pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or antique devices.

(11) An explosive that is lawfully possessed for use in legitimate agricultural or business activities.



**Instruction No. 7.85. Use of Overpressure Device.****I.C. 25-47.5-5-9.**

The crime of use of overpressure device is defined as follows:

A person who knowingly or intentionally uses an overpressure device commits a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. used an overpressure device.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of use of an overpressure device, a Class A misdemeanor, charged in Count \_\_\_\_\_.

### Comments

The term "overpressure device" is defined by law. See I.C. 35-47.5-2-11; Instruction No. 14.142A.

Trial of use of an overpressure device as a Class D felony must be bifurcated. See Instruction No. 15.76b.

I.C. 35-47.5-5-1 contains a list of exemptions to which the offense above "does not apply." These exemptions in the statute are, in the Committee's opinion, the Defendant's to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The exemptions are:

- (1) A person authorized to manufacture, possess, transport, distribute, or use a destructive device or detonator under the laws of the United States, as amended, or under Indiana law when the person is acting in accordance with the laws, regulations, and rules issued under federal or Indiana law.
- (2) A person who is issued a permit for blasting or surface coal mining by the director of the department of natural resources under IC 14-34 when the person is acting under the laws and rules of Indiana and any ordinances and regulations of the political subdivision or authority of the state where blasting or mining operations are being performed.
- (3) Fireworks (as defined in IC 22-11-14-1) and a person authorized by the laws of Indiana and of the United States to manufacture, possess, distribute, transport, store, exhibit, display, or use fireworks.
- (4) A law enforcement agency, a fire service agency, or an emergency management agency of Indiana, an agency or an authority of a political subdivision of the state or the United States, and an employee or authorized agent of the United States while in performance of official duties.
- (5) A law enforcement officer, a fire official, or an emergency management official of the United States or any other state if that person is attending training in Indiana.
- (6) The armed forces of the United States or of Indiana.
- (7) Research or educational programs conducted by or on behalf of a college, university, or secondary school that are:
  - (A) authorized by the chief executive officer of the educational institution or the officer's designee; or
  - (B) conducted under the policy of the educational institution; and conducted in accordance with the laws of the United States and Indiana.
- (8) The use of explosive materials in medicines and medicinal agents in forms prescribed by the most recent published edition of the official United States Pharmacopoeia or the National Formulary.
- (9) Small arms ammunition and reloading components of small arms ammunition.
- (10) Commercially manufactured black powder in quantities not to exceed fifty (50) pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or antique devices.
- (11) An explosive that is lawfully possessed for use in legitimate agricultural or business activities.



**Instruction No. 7.87. Deploying a Booby Trap****I.C. 35-47.5-5-10.**

The crime of deploying a booby trap is defined as follows:

A person who knowingly or intentionally deploys a booby trap commits a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. deployed a booby trap.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of deploying a booby trap, a Class D felony, charged in Count \_\_\_\_\_.



### Comments

The term “booby trap” is defined by law. See I.C. 35-47.5-2-2; Instruction No. 14.14.

I.C. 35-47.5-5-1 contains a list of exemptions to which the offense above “does not apply.” These exemptions in the statute are, in the Committee’s opinion, the Defendant’s to prove. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001). The exemptions are:

(1) A person authorized to manufacture, possess, transport, distribute, or use a destructive device or detonator under the laws of the United States, as amended, or under Indiana law when the person is acting in accordance with the laws, regulations, and rules issued under federal or Indiana law.

(2) A person who is issued a permit for blasting or surface coal mining by the director of the department of natural resources under IC 14-34 when the person is acting under the laws and rules of Indiana and any ordinances and regulations of the political subdivision or authority of the state where blasting or mining operations are being performed.

(3) Fireworks (as defined in IC 22-11-14-1) and a person authorized by the laws of Indiana and of the United States to manufacture, possess, distribute, transport, store, exhibit, display, or use fireworks.

(4) A law enforcement agency, a fire service agency, or an emergency management agency of Indiana, an agency or an authority of a political subdivision of the state or the United States, and an employee or authorized agent of the United States while in performance of official duties.

(5) A law enforcement officer, a fire official, or an emergency management official of the United States or any other state if that person is attending training in Indiana.

(6) The armed forces of the United States or of Indiana.

(7) Research or educational programs conducted by or on behalf of a college, university, or secondary school that are:

(A) authorized by the chief executive officer of the educational institution or the officer’s designee; or

(B) conducted under the policy of the educational institution; and conducted in accordance with the laws of the United States and Indiana.

(8) The use of explosive materials in medicines and medicinal agents in forms prescribed by the most recent published edition of the official United States Pharmacopoeia or the National Formulary.

(9) Small arms ammunition and reloading components of small arms ammunition.

(10) Commercially manufactured black powder in quantities not to exceed fifty (50) pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers intended to be used solely for sporting, recreational, or cultural purposes in antique firearms or antique devices.

(11) An explosive that is lawfully possessed for use in legitimate agricultural or business activities.<sup>21</sup>



**Instruction No. 7.89. Possession of Knife at School.****I.C. 35-47-5-2.5.**

The crime of possession of a knife at school is defined by law as follows:

A person who recklessly, knowingly, or intentionally possesses a knife on [school property] [a school bus] [a special purpose bus] commits possession of a knife at school, a Class B misdemeanor. [The offense is a Class D felony if it results in bodily injury or serious bodily injury to another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. possessed a knife
4. on [school property] [a school bus] [a special purpose bus]
- [5. (for D felony) and the possession resulted in (bodily injury) (serious bodily injury) to (name alleged person), another person.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a knife at school, a Class B misdemeanor/C felony as charged in Count \_\_\_\_\_.

**Comments**

The terms “bodily injury,” “knife,” school bus” (commentary), “school property,” “serious bodily injury,” and “special purpose bus” are defined by law. I.C. 35-46-1-1; I.C. 35-47-5-2.5; I.C. 20-27-2-8; I.C. 35-41-1-24.7; I.C. 35-41-1-25; and I.C. 20-27-2-10; Instruction Nos. 14.13; 14.119.5; 14.181; 14.183; 14.185, and 14.192.

Trial of this offense as a Class A misdemeanor for having a previous unrelated conviction must be bifurcated. See Instruction No. 15.87.

I.C. 35-47-5-2.5(d) provides:

This section does not apply to a person who possesses a knife:

- (1) if:
  - (A) the knife is provided to the person by the school corporation or possession of the knife is authorized by the school corporation; and
  - (B) the person uses the knife for a purpose authorized by the school corporation; or
- (2) if the knife is secured in a motor vehicle.

The Committee believes that this “does not apply” provision was intended by the legislature to establish “exceptions” to criminal liability under this section. The burden to prove an exemption or exception to a crime has been held to be a defendant’s by a preponderance of the evidence. See *Harris v. State*, 716 N.E.2d



406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001).

**Instruction No. 7.101. Failure to Act as Required After Accident Involving Bodily Injury.**

**I.C. 9-26-1-8.**

The crime of failure to act as required after an accident involving bodily injury is defined by law as follows:

The driver of a vehicle who [knows (he) (she) was in an accident] [should have known that (he) (she) was in an accident] [should reasonably have anticipated that (his) (her) operation of the vehicle resulted in injury to a person] is under a duty imposed by law to do the following:

- Stop; or
- Immediately stop the vehicle at the scene of the accident or as close to the accident as possible in a manner that does not obstruct traffic more than is necessary; and
- Immediately return to and remain at the scene of the accident until the driver does the following:

Gives the driver's name and address and the registration number of the vehicle the driver was driving; and

Upon request, exhibits the driver's license of the driver to the following:

The person struck.

The driver or occupant of or person attending each vehicle involved in the accident; and

- Determine the need for and render reasonable assistance to each person [injured] [entrapped] in the accident, including the removal or the making of arrangements for
  - [the removal from the scene of the accident of each injured person to a physician or hospital for medical treatment] and/or
  - [the removal of each entrapped person from the vehicle in which the person is entrapped].

A person who knowingly or intentionally fails to comply with this duty imposed by law after causing injury to a person commits the crime of failure to act as required after an accident involving bodily injury, a Class A misdemeanor. [The offense is a Class D felony if the accident involves serious bodily injury to a person.] [The offense is a Class C felony if the accident involves the death of a person.] [The offense is a Class B felony if it is committed after the person commits operating while intoxicated causing serious bodily injury.\* \* \*]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant



2. was the driver of a vehicle involved in an accident
3. and the Defendant caused injury to (*name of injured person*), and
- \*\*4. the Defendant
  - [knew that (he) (she) had been in an accident]
  - [or]
  - [should have known that (he) (she) had been in an accident]
  - [or]
  - [should reasonably have anticipated that (his) (her) operation of the vehicle had resulted in injury to a person] and
5. the Defendant knowingly or intentionally
6. [did not stop the vehicle]
  - [or] [and]
  - [did not immediately stop the vehicle at the scene of the accident or as close to the accident as possible]
  - [or] [and]
  - [did not immediately return to and remain at the scene of the accident until (Defendant) had:
    - (a) given (Defendant's) name and address and the registration number of the vehicle (Defendant) had been driving, and
    - (b) upon request, exhibited (Defendant's) driver's license to the person struck and to the driver or occupant of or person attending each vehicle involved in the accident,
  - [or] [and]
  - [did not determine the need for and did not render reasonable assistance to each person injured in the accident, including the removal or the making of arrangements for the removal of each injured person to a physician or hospital for medical treatment]
  - [or] [and]
  - [did not determine the need for and did not render reasonable assistance to each person entrapped in the accident, including the removal or the making of arrangements for the removal of each entrapped person from the vehicle in which the person was entrapped]
- [7. and the accident involved serious bodily injury to (*name*)]
- [8. and the accident involved the death of (*name*)]
- [9. and the Defendant committed the offense of failure to act as required after an



accident after the Defendant had committed the offense of operating while intoxicated causing serious bodily injury\*\*\*].

If the State failed to prove each of these elements beyond a reasonable doubt, then you must find the Defendant not guilty of failure to act as required after an accident involving bodily injury, a class A misdemeanor/class D/C felony.

### Comment

The terms “entrapment and entrapped,” “serious bodily injury,” and “vehicle” are defined by law. *See* I.C. 9-13-2-49.7, I.C. 9-30-2-196, and I.C. 35-41-1-25; Instructions Nos. 14.79.5, 14.216, and 14.185.

Trial of failure to act as required after an accident involving bodily injury as a Class D felony for prior conviction of an I.C. 9-30-10-4(a) offense must be bifurcated—*see* Instruction No. 15.94.

\*I.C. 9-26-1-8, which defines this crime, applies when a person “fails to stop *or* comply with section 1(1) or 1(2) of this chapter [I.C. 9-26-1-1(1) or (2)] after causing injury to a person.” This language indicates that the crime is committed when there is either: (1) a failure to stop or (2) a failure to comply with I.C. 9-26-1-1(1) or (2). Such a construction, however, results in two distinct “stop” liabilities—the first is a simple failure to “stop,” the second a failure to comply with the I.C. 9-26-1-1(1) requirement that a motorist “[I]mmediately stop ... at the scene ... or as close ... as possible.” These dual “stop” duties are reflected in the instruction. Carefully consider which varieties of stopping violation are alleged in the charging instrument and instruct only on the ones contained in the charge.

\*\*The instruction employs the language used by the Indiana Supreme Court in holding that a knowledge element of having been involved in an accident was implied in a prior version of this offense:

The jury may infer that a defendant knew that an accident occurred or that people were injured from an examination of the circumstances of the event. Where conditions were such that the driver should have known that an accident occurred or should have reasonably anticipated that the accident resulted in injury to a person, the requisite proof of knowledge is present.

*Micinski v. State*, 487 N.E.2d 150, 153 (Ind. 1986).

\*\*\*If the defendant will not stipulate that he had committed the offense of operating while intoxicated resulting in serious bodily injury, it will be necessary to have the jury determine that he had. *See* Instruction Nos. 7.111, 7.112, 7.113, and 7.114 for the instructions on the respective versions of the operating while intoxicated resulting in serious bodily injury offenses.

The Committee notes that there is a variety of language used in the statutes to characterize the relationship between the driving and the injury. I.C. 9-26-1-1 establishes the particular duties of the driver to stop, provide assistance, and give information; that statute refers to “an accident that *results* in the injury or death of a person.” The statute which defines the crime, however, imposes liability on a driver for failing to stop “after *causing* injury to a person,” and makes the class

of the crime more severe when "the accident *involves*" serious bodily injury or death. The Committee has used these terms in the instruction in the same manner they are used in the statutes.



**Instruction No. 7.111. Operating a Vehicle With Eight-hundredths (0.08) Gram of Alcohol, A misdemeanor.**

**I.C. 9-30-5-1(a).**

**I.C. 9-30-5-3 With Passenger Under 18, D felony.**

**I.C. 9-30-5-4 Causing Serious Bodily Injury, D felony.**

**I.C. 9-30-5-5 Causing Death, C felony.**

The crime of operating a vehicle with eight-hundredths (0.08) gram of alcohol is defined by law as follows:

A person who operates a vehicle with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol \* but less than fifteen-hundredths (0.15) gram of alcohol per [one hundred (100) milliliters of the person's blood][two hundred ten liters (210) liters of the person's breath] commits a Class C misdemeanor. [The offense is a class D felony if the person is at least twenty-one (21) years of age and at least one (1) passenger in the vehicle is less than eighteen (18) years of age.] [The offense is a class D felony if the person causes serious bodily injury to another person.] [The offense is a class C felony if the person causes the death of another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. Operated a vehicle
3. with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per  
[one hundred (100) milliliters of Defendant's blood]  
[or]  
[two hundred ten (210) liters of Defendant's breath]
- [4. *(for class D felony)* and  
the Defendant was at least twenty-one years of age  
and  
at least one passenger in the vehicle was less than eighteen (18) years of age.]
- [5. *(for class D felony)* and Defendant's operation of the vehicle caused serious bodily injury to *(name)*.]
- [6. *(for class C felony)* and Defendant's operation of the vehicle caused the death of *(name)*.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Operating a Vehicle With Eight-hundredths



(0.08) Gram of Alcohol, a Class C misdemeanor/Class D/C felony charged in Count

### Comments

The terms “vehicle” and “serious bodily injury” are defined by law. *See* I.C. 9-13-2-196 and I.C. 35-41-1-25; Instructions 14.216 and 14.185.

\*Only I.C. 9-30-5-1(a) contains the language of “but less than fifteen hundredths (0.15) gram of alcohol”. This language is omitted from I.C. 9-30-5-4 and 5.

Although the language is contained in I.C. 9-30-5-1(a), it is the opinion of the Committee that the State is not required to prove that the alcohol concentration equivalent is less than fifteen hundredths (0.15) gram of alcohol, but rather that this language is only meant to distinguish this offense from the offense of Operating with an Alcohol Concentration Equivalent of Fifteen-hundredths Gram of Alcohol or More.

The crime is raised to a D felony if the person has a previous conviction for operating while intoxicated and the previous conviction of operating while intoxicated occurred within the five (5) years immediately preceding the occurrence of the present violation. If a prior offense is alleged, the trial must be bifurcated. *See* Instruction No. 15.46.

The offense is raised to a C felony if the defendant had a prior conviction of operating while intoxicated which resulted in death or serious bodily injury. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. *See* Instruction No. 15.101.

The crime is raised to a C felony if the person is convicted of the offense as a D felony resulting in serious bodily injury and the person has a prior conviction of operating while intoxicated within the five years immediately preceding the commission of the offense. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. *See* Instruction No. 15.47.

The crime is raised to a B felony if the person is convicted of the offense as a C felony resulting in death and the person has a prior conviction of operating while intoxicated within the five years immediately preceding the commission of the offense. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. *See* Instruction No. 15.47.

The offense is raised to a B felony if it both resulted in death and the person knew that the person’s driver’s license, driving privilege, or permit was suspended or revoked for a “previous conviction of operating a vehicle while intoxicated.” If this variation of the offense is alleged, the trial must be bifurcated. *See* Instruction No. 15.47a.

The committee notes it has been held that there is no *mens rea* element in this crime. *English v. State* (1992), 603 N.E.2d 161.



**Instruction No. 7.112. Operating a Vehicle With Fifteen-hundredths (0.15) Gram of Alcohol, A misdemeanor; With Passenger Under 18, D felony.**

**I.C. 9-30-5-1(b).**

**I.C. 9-30-5-3(2).**

The crime of operating a vehicle with fifteen-hundredths (0.15) gram of alcohol is defined by law as follows:

A person who operates a vehicle with an alcohol concentration equivalent to at least fifteen-hundredths (0.15) gram of alcohol per [one hundred (100) milliliters of the person's blood][two hundred ten liters (210) liters of the person's breath] commits a Class A misdemeanor. [The offense is a class D felony if the person is at least twenty-one (21) years of age and at least one (1) passenger in the vehicle is less than eighteen (18) years of age.] [The offense is a class D felony if the person causes serious bodily injury to another person.] [The offense is a class C felony if the person causes the death of another person.] [The offense is a class B felony if the person is at least twenty-one and causes the death of another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. operated a vehicle
3. with an alcohol concentration equivalent to at least fifteen-hundredths (0.15) gram of alcohol per
  - [one hundred (100) milliliters of Defendant's blood]
  - [or]
  - [two hundred ten (210) liters of Defendant's breath]
- [4. (*for class D felony*) when
  - the Defendant was at least twenty-one years of age
  - and
  - at least one passenger in the vehicle was less than eighteen (18) years of age.]
- [5. (*for class D felony*) and Defendant's operation of the vehicle caused serious bodily injury to (*name*).]
- [6. (*for class C felony*) and Defendant's operation of the vehicle caused the death of (*name*).]
- [7. (*for class B felony*) and at the time of the operation of the vehicle
  - Defendant was twenty-one (21) or more years of age
  - and



Defendant's operation of the vehicle caused the death of (name).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Operating a Vehicle With Fifteen-hundredths (0.15) Gram of Alcohol, a Class A misdemeanor/Class D/C/B felony charged in Count \_\_\_\_\_.

### Comments

The term "vehicle" is defined by law. See I.C. 9-13-2-196 and Instruction 14.216.

The crime is raised to a D felony if the person has a previous conviction for operating while intoxicated and the previous conviction of operating while intoxicated occurred within the five (5) years immediately preceding the occurrence of the present violation. If a prior offense is alleged, the trial must be bifurcated. See Instruction No. 15.46.

The offense is raised to a C felony if the defendant had a prior conviction of operating while intoxicated which resulted in death or serious bodily injury. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. See Instruction No. 15.101.

The crime is raised to a C felony if the person is convicted of the offense as a D felony resulting in serious bodily injury and the person has a prior conviction of operating while intoxicated within the five years immediately preceding the commission of the offense. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. See Instruction No. 15.47.

The crime is raised to a B felony if the person is convicted of the offense as a C felony resulting in death and the person has a prior conviction of operating while intoxicated within the five years immediately preceding the commission of the offense. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. See Instruction No. 15.47.

The offense is raised to a B felony if it both resulted in death and the person knew that the person's driver's license, driving privilege, or permit was suspended or revoked for a "previous conviction of operating a vehicle while intoxicated." If this variation of the offense is alleged, the trial must be bifurcated. See Instruction No. 15.47a.

The committee notes it has been held that there is no *mens rea* element in this crime. *English v. State* (1992), 603 N.E.2d 161.



**Instruction No. 7.113. Operating a Vehicle With Controlled Substance or Metabolite.**

**I.C. 9-30-5-1(c).**

**I.C. 9-30-5-3(2) With Passenger Under 18, D felony.**

**I.C. 9-30-5-4 Causing Serious Bodily Injury, D felony.**

**I.C. 9-30-5-5 Causing Death, C felony.**

The crime of operating a vehicle with controlled substance or metabolite is defined by law as follows:

A person who operates a vehicle with a controlled substance listed in Schedule I or II of I.C. 35-48-2 or its metabolite in the person's body commits a Class C misdemeanor. [The offense is a class D felony if the person is at least twenty-one (21) years of age and at least one (1) passenger in the vehicle is less than eighteen (18) years of age.] [The offense is a class D felony if the person causes serious bodily injury to another person.] [The offense is a class C felony if the person causes the death of another person.] [The offense is a class B felony if the person is at least twenty-one and causes the death of another person.]

[It is a defense that the accused person consumed the controlled substance under a valid prescription or order of a practitioner (as defined in I.C. 35-48-1) who acted in the course of the practitioner's professional practice.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant

2. operated a vehicle

3. [with a controlled substance listed in Schedule I or II, namely \_\_\_\_\_]

[or]

[with a metabolite of a controlled substance listed in schedule I or II, namely \_\_\_\_\_]

4. in the Defendant's body

[5. the Defendant did not consume the controlled substance under a valid prescription or order of a practitioner acting in the course of the practitioner's professional practice.]

[6. (for class D felony) and

the Defendant was at least twenty-one years of age

and

at least one passenger in the vehicle was less than eighteen (18) years of age.]

[7. (for class D felony) and Defendant's operation of the vehicle caused serious



bodily injury to (name).]

[8. (for class C felony) and Defendant's operation of the vehicle caused the death of (name).]

[9. (for class B felony) and at the time of the operation of the vehicle

Defendant was twenty-one (21) or more years of age

and

Defendant's operation of the vehicle caused the death of (name).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of operating a vehicle with controlled substance or metabolite, a Class C misdemeanor/ Class D/C felony charged in Count

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### Comments

The terms "vehicle" and "serious bodily injury" are defined by law. See I.C. 9-13-2-196 and I.C. 35-41-1-25; Instructions 14.216 and 14.185.

The language relating to the defense of a valid prescription should only be included when the evidence raises the issue.

The crime is raised to a D felony if the person has a previous conviction for operating while intoxicated and the previous conviction of operating while intoxicated occurred within the five (5) years immediately preceding the occurrence of the present violation. If a prior offense is alleged, the trial must be bifurcated. See Instruction No. 15.46.

The offense is raised to a C felony if the defendant had a prior conviction of operating while intoxicated which resulted in death or serious bodily injury. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. See Instruction No. 15.101.

The crime is raised to a C felony if the person is convicted of the offense as a D felony resulting in serious bodily injury and the person has a prior conviction of operating while intoxicated within the five years immediately preceding the commission of the offense. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. See Instruction No. 15.47.

The crime is raised to a B felony if the person is convicted of the offense as a C felony resulting in death and the person has a prior conviction of operating while intoxicated within the five years immediately preceding the commission of the offense. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. See Instruction No. 15.47.

The offense is raised to a B felony if it both resulted in death and the person knew that the person's driver's license, driving privilege, or permit was suspended or revoked for a "previous conviction of operating a vehicle while intoxicated." If this variation of the offense is alleged, the trial must be bifurcated. See Instruction No. 15.47a.

The committee notes it has been held that there is no *mens rea* element in this crime. *English v. State* (1992), 603 N.E.2d 161.

It is not necessary for the jury to determine whether the substance is classified as a controlled substance on a particular schedule. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").



**Instruction No. 7.114. Operating a Vehicle While Intoxicated.****I.C. 9-30-5-2(a) & (b).****I.C. 9-30-5-3(2) With Passenger Under 18, D felony.****I.C. 9-30-5-4 Causing Serious Bodily Injury, D felony.****I.C. 9-30-5-5 Causing Death, C felony.**

The crime of operating a vehicle while intoxicated is defined by law as follows:

A person who operates a vehicle while intoxicated commits a Class C Misdemeanor. [A person who operates a vehicle while intoxicated in a manner that endangers a person commits a Class A misdemeanor.] [The offense is a class D felony if the person operates a vehicle while intoxicated in a manner that endangers a person and the person is at least twenty-one (21) years of age and at least one (1) passenger in the vehicle is less than eighteen (18) years of age.] [The offense is a class D felony if the person causes serious bodily injury to another person.] [The offense is a class C felony if the person causes the death of another person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. operated a vehicle
3. while intoxicated
- [4. (*for class A misdemeanor*) in a manner that endangered a person]
- [5. (*for class D felony*)

in a manner that endangered a person

and the Defendant was at least twenty-one years of age

and

at least one passenger in the vehicle was less than eighteen (18) years of age.]

- [6. (*for class D felony*) and caused serious bodily injury to (*name*)]
- [7. (*for class C felony*) and caused the death of (*name*)]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of operating a vehicle while intoxicated [With Passenger Under 18] [Causing Serious Bodily Injury] [Causing Death], a Class C/A misdemeanor/ Class D/C felony charged in Count \_\_\_\_\_.

**Comments**

The terms “vehicle” and “serious bodily injury” are defined by law. See I.C. 9-13-2-196 and I.C. 35-41-1-25; Instructions 14.216 and 14.185.

The crime is raised to a D felony if the person has a previous conviction for

operating while intoxicated and the previous conviction of operating while intoxicated occurred within the five (5) years immediately preceding the occurrence of the present violation. If a prior offense is alleged, the trial must be bifurcated. *See* Instruction No. 15.46.

The crime is raised to a C felony if the defendant had a prior conviction of operating while intoxicated which resulted in death or serious bodily injury. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. *See* Instruction No. 15.101.

The crime is raised to a C felony if the person is convicted of the offense as a D felony resulting in serious bodily injury and the person has a prior conviction of operating while intoxicated within the five years immediately preceding the commission of the offense. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. *See* Instruction No. 15.47.

The crime is raised to a B felony if the person is convicted of the offense as a C felony resulting in death and the person has a prior conviction of operating while intoxicated within the five years immediately preceding the commission of the offense. If this variation of the offense is alleged, the prior conviction issue must be bifurcated. *See* Instruction No. 15.47.

The offense is raised to a B felony if it both resulted in death and the person knew that the person's driver's license, driving privilege, or permit was suspended or revoked for a "previous conviction of operating a vehicle while intoxicated." If this variation of the offense is alleged, the trial must be bifurcated. *See* Instruction No. 15.47a.

The committee notes it has been held that there is no *mens rea* element in this crime. *English v. State* (1992), 603 N.E.2d 161.



**Instruction No. 7.117. Prima Facie Evidence of Intoxication.**

By statute, prima facie evidence of intoxication includes evidence that at the time of an alleged violation there was at least eight-hundredths (.08) gram of alcohol in one hundred (100) milliliters of the person's blood at the time the test sample was taken or in two hundred ten (210) liters of the person's breath.

'Prima facie' means that quantity of evidence necessary to prove a fact. It creates an inference that the Defendant was sufficiently under the influence of alcohol to lessen Defendant's driving ability so as to be intoxicated within the meaning of the law. This inference is not conclusive. You may accept it or reject it.

**Comments**

Though the statute makes the alcohol level of .08 and above a mandatory presumption, the jury must be instructed that it is permissive. *Hall v. State*, 560 N.E.2d 561 (Ind. Ct. App. 1990); *Thompson v. State*, 646 N.E.2d 687 (Ind. Ct. App. 1995).

The term "intoxication" is defined by law. See I.C. 9-13-2-86; Instruction No. 14.118.

**Instruction No. 7.118. Operating a Vehicle With Eight-hundredths (0.08) Gram of Alcohol Causing Death of Law Enforcement Animal.**

**I.C. 9-30-5-5(c).**

The crime of causing the death of a law enforcement animal while operating a motor vehicle is defined by law as follows:

A person who causes the death of a law enforcement animal while operating a vehicle with [an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per (one hundred (100) milliliters of the person's blood) (two hundred ten liters (210) liters of the person's breath)] [a controlled substance listed in schedule I or II of IC 35-48-2 or its metabolite in the person's blood] commits causing the death of a law enforcement animal while operating a motor vehicle, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. caused the death of a law enforcement animal (as defined in IC 35-46-3-4.5)
3. when the Defendant was operating a motor vehicle
4. when the Defendant had an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per

[one hundred (100) milliliters of Defendant's blood]

[or]

[two hundred ten (210) liters of Defendant's breath]

[or]

when the Defendant had (*name substance*), a controlled substance listed in schedule I or II of IC 35-48-2 or its metabolite, in the Defendant's blood.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of causing the death of a law enforcement animal while operating a motor vehicle, a Class D felony charged in Count \_\_\_\_\_.

**Comments**

The terms "law enforcement animal" and "motor vehicle" are defined by law. See I.C. 35-46-3-4.5, I.C. 9-13-2-105; Instruction Nos. 14.122, 14.137.

(Text continued on page 7-137)



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**Instruction No. 7.121. Operating a Motor Vehicle While Suspended as an Habitual Traffic Violator.**

**I.C. 9-30-10-16(a)(1).**

The crime of operating a motor vehicle while suspended as an habitual traffic violator is defined by law as follows:

A person who operates a motor vehicle while the person's driving privileges are validly suspended under [IC 9-30-10 (current law)] [IC 9-12-2 (repealed July 1, 1991)] and the person knows that the person's driving privileges are suspended commits operating a motor vehicle while suspended as an habitual traffic violator, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. operated a motor vehicle
3. when the Defendant's driving privileges were validly suspended under [IC 9-30-10 (current law)] [IC 9-12-2 (repealed July 1, 1991)]
4. and
5. when the Defendant knew that [his] [her] driving privileges were suspended.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of operating a motor vehicle while suspended as an habitual traffic violator, a Class D felony.

**Comments**

It was held in *State v. Jackson*, 889 N.E.2d 819 (Ind. 2008), that in a prosecution for operating while suspended as an habitual traffic violator the statutory *mens rea* element that "the person knows that the person's driving privileges are suspended" "requires knowledge only that the driving privileges are suspended, and not that they are suspended because of an HTV determination." *Id.* at 822. The instruction's item 5. on the knowledge element does not limit the knowledge to an HTV-based suspension, and accordingly is consistent with the *Jackson* ruling.

*Jackson* held that the defendant's admission to police that he knew his license was suspended sufficed to prove the knowledge element of the 9-30-10-16(a)(1) offense, so that the trial court erred by requiring the State to prove that the defendant knew his license had been suspended because he was an HTV. The Court also noted that this admission of actual knowledge of a suspension obviated the need for the State to utilize the 9-30-10-16(b) presumption of knowledge of a suspension. *Jackson*, 889 N.E.2d at 822. (For an instruction on this presumption of knowledge, see Instruction No. 7.125.)

Note that in *State v. Fields*, 679 N.E.2d 898 (Ind. 1997), the knowledge element of the offense was formulated as "knew or reasonably could have known" the



license was suspended, but this caselaw definition was supplanted by the 2000 amendment to IC 9-30-10-16 to require that the defendant "knows that the person's driving privileges are suspended."

**Instruction No. 7.123. Validly Suspended.****I.C. 9-30-10-5.****I.C. 9-30-10-6.****I.C. 9-30-10-8.**

The suspension of a person's driving privileges as a habitual traffic offender is valid if:

1. the Bureau of Motor Vehicles mailed a notice of the suspension to the person at the person's last known address; and
2. the Bureau's notice of suspension informed the person that
  - the person might be entitled to relief if the person's driving record with the Bureau contained a material error, and
  - the person could notify the Bureau that the Bureau's records for the person's driving record did contain a material error, and
  - the Bureau would reinstate the person's license if it found that a material error was made with respect to the person's driving record, and
  - the person could seek judicial review of the habitual offender suspension at which the person could not only challenge the Bureau's review of the person's driving record for errors but could also raise any legal defenses available to the suspension.

The State has the burden to prove beyond a reasonable doubt that the suspension of Defendant's driving privileges was valid.

**Comments**

Proof of mailing of notice is not necessary to prove a driver knew his license was suspended as a habitual traffic violator, but it is necessary to prove that the suspension is valid. *Fields v. State*, 679 N.E.2d 898 (Ind. 1997).



**Instruction No. 7.125. Presumption of Knowledge of Habitual Traffic Offender Suspension.**

**I.C. 9-30-10-16.**

If you find that the State has proved beyond a reasonable doubt that:

1. the Bureau of Motor Vehicles served notice of the suspension of the Defendant's driving privileges on the Defendant
  - by first class mail
  - sent to the last address shown for the defendant in the Bureau of Motor Vehicles' records, and
2. the Bureau's notice of suspension informed the Defendant that
  - Defendant might have been entitled to relief if Defendant's driving record with the Bureau contained a material error, and
  - Defendant could notify the Bureau that the Bureau's records for Defendant's driving record did contain a material error, and
  - the Bureau would reinstate Defendant's license if it found that a material error was made with respect to Defendant's driving record, and
  - Defendant could seek judicial review of the habitual offender suspension at which the Defendant could not only challenge the Bureau's review of Defendant's driving record for errors but could also raise any legal defenses available to the suspension,

then you may find that the State has established an inference that the Defendant knew from the notice that Defendant's driving privileges had been suspended. This inference is not conclusive. You are free to accept or reject the inference in determining whether the State has proved beyond a reasonable doubt that the Defendant knew of the suspension of driving privileges when [he] [she] operated a motor vehicle as alleged.

**Comments**

The statutory rebuttable presumption addressed in this instruction was created by the 2000 amendment to IC 9-30-10-16.

*State v. Jackson*, 889 N.E.2d 819 (Ind. 2008), held that the defendant's knowledge his driving privileges were suspended can be proved by direct evidence — *e.g.*, an admission by defendant to police that he knew his privileges were suspended, so that this provision above for establishment of knowledge by presumption is not intended to be an exclusive method for proving the knowledge element.

**Instruction No. 7.127. Operating a Motor Vehicle in Violation of Restrictions Imposed for Being a Habitual Traffic Violator.**

**I.C. 9-30-10-16.**

The crime of operating a motor vehicle in violation of restrictions imposed for being a habitual traffic violator is defined by law as follows:

A person who operates a motor vehicle in violation of restrictions imposed under [I.C. 9-30-10, the habitual traffic violator chapter] [I.C. 9-12-2 (repealed July 1, 1991), the former habitual traffic violator chapter] and who knows of the existence of the restrictions commits operating a motor vehicle in violation of restrictions imposed for being a habitual traffic violator, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. operated a motor vehicle [and] [when] [while] [describe alleged violation of license restriction];
3. when the Defendant's driving privileges were subject to the restriction that [he] [she] [describe restriction];
4. and this restriction had been imposed on Defendant because Defendant had been found to be a habitual traffic violator under [I.C. 9-30-10 (current law)] [I.C. 9-12-2 (repealed July 1, 1991)];
5. and when the Defendant operated the motor vehicle the Defendant knew of the existence of the restriction on [his] or [her] driving privileges that [he] or [she] [describe restriction].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of operating a motor vehicle in violation of restrictions imposed for being a habitual traffic violator, a Class D felony.



**Instruction No. 7.129. Operating a Motor Vehicle When Driving Privileges Have Been Revoked for Life.****I.C. 9-30-10-17.**

The crime of operating a motor vehicle when driving privileges have been revoked for life is defined by law as follows:

A person who operates a motor vehicle after the person's driving privileges are forfeited for life under [I.C. 9-30-10-16] and [I.C. 9-12-3-1, repealed July 1, 1991] [I.C. 9-4-13-14, repealed Apr. 1, 1984)] commits operating a motor vehicle when driving privileges have been revoked for life, a Class C felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. operated a motor vehicle;
3. when the Defendant's driving privileges were forfeited for life under [I.C. 9-30-10-16 (current law since July 1, 1991)] [I.C. 9-12-3-1 (April 1, 1984 to July 1, 1991)] [I.C. 9-4-13-14 (repealed April 1, 1984)];
4. and when the Defendant knew or should have known that [his] or [her] privileges had been forfeited for life.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of operating a motor vehicle when driving privileges have been revoked for life, a Class C felony.

**Comments**

This instruction takes the conservative position that knowledge of the lifetime forfeiture is to be proved as an element. The caselaw, however, raises some doubt about it. For example, one recent case suggests that knowledge of the lifetime forfeiture is not an element of the offense:

However, Indiana Code Section 9-30-10-17, the statute under which Pierce was convicted, includes no such explicit knowledge requirement. Presumably, this is because with a conviction, unlike with a BMV-generated suspension or adjudication, the defendant is necessarily more directly involved. A defendant who has been convicted of being a habitual traffic offender and whose license has accordingly been suspended for life has almost certainly appeared in court, entered a plea of guilty or been convicted after a trial in which he participated, and been sentenced by the trial court to a lifetime suspension. [Footnote omitted.] *See Bates v. State*, 650 N.E.2d 754, 758 (Ind. Ct. App. 1995) (finding that a prior conviction after a guilty plea supported the "the reasonable inference ... that Bates had actual knowledge of the forfeiture for life of his driving privileges, which was one of the provisions of his sentence, as well as of his conviction"). We accordingly find that in cases where a defendant is charged with a Class C felony under Indiana Code § 9-30-10-17, proof of a prior conviction of being a habitual traffic violator with a license suspended for life,



together with proof that the defendant was driving the vehicle, is sufficient to sustain a conviction. That prior conviction may be proven by BMV records pursuant to Indiana Code § 9-30-3-15 provided the State properly ties the BMV record to the defendant. Should the information in the BMV record be incorrect, it is up to the defendant to rebut the *prima facie* evidence provided by the BMV record of the conviction.

*Pierce v. State*, 737 N.E.2d 1211, 1214 (Ind. Ct. App. 2000), *transfer denied*, 753 N.E.2d 3 (Ind. 2001).

A subsequent case, however, leaves the matter unclear, in part by suggesting that in the jury trial the evidence sufficed to indicate that “the trial court” could have inferred knowledge of the suspension:

We have required as sufficient proof of a lifetime suspension only that a defendant “knew or should have known that his driving privileges were forfeited,” *Austin v. State*, 700 N.E.2d 1191, 1192 (Ind. Ct. App. 1998), *transfer denied*, 726 N.E.2d 308 (Ind. 1999). We recently addressed the knowledge requirement of Ind. Code § 9-30-10-17 in *Pierce v. State*, 737 N.E.2d 1211 (Ind. Ct. App. 2000). There, *Pierce* argued there was insufficient evidence he knew of the prior conviction as an HTV that was the basis for his lifetime suspension. We explained the absence of an explicit “knowledge” requirement in that code section:

Presumably, this is because with a conviction, unlike with a BMV-generated suspension or adjudication, the defendant is necessarily more directly involved. A defendant who has been convicted of being a habitual traffic offender and whose license has accordingly been suspended for life has almost certainly appeared in court, entered a plea of guilty or been convicted after a trial in which he participated, and been sentenced by the trial court to a lifetime suspension. 737 N.E.2d at 1214.

Wilkinson was convicted in 1988 after a guilty plea of operating a vehicle while a habitual traffic offender, and his sentence included a lifetime suspension (R. at 315). The trial court could have reasonably inferred from this evidence of Wilkinson’s conviction and sentence that Wilkinson knew of his lifetime suspension, and we cannot say the trial court erred in its determination that this element of Wilkinson’s offense was satisfied.

*Wilkinson v. State*, 743 N.E.2d 1267, 1272 (Ind. Ct. App. 2001), *transfer denied*, 753 N.E.2d 16.



**Instruction No. 7.201. Cruelty to an Animal.**

This instruction has been deleted.

**Instruction No. 7.203. Furnishing Alcoholic Beverage to a Minor.****I.C. 7.1-5-7-8.**

The crime of furnishing an alcoholic beverage to a minor is defined by law as follows:

A person who recklessly, knowingly, or intentionally sells, barter, exchanges, provides, or furnishes an alcoholic beverage to a minor commits furnishing an alcoholic beverage to a minor, a Class B misdemeanor. [The offense is a Class D felony if the consumption, ingestion, or use of the alcoholic beverage is the proximate cause of the serious bodily injury or death of any person.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. [sold] [bartered] [exchanged] [provided] [furnished]
4. an alcoholic beverage
5. to [name person]
6. when [name person] was a minor
- [7. and the (consumption) (ingestion) (use) of the alcoholic beverage was the proximate cause of (serious bodily injury) (death) to (name person).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of furnishing an alcoholic beverage to a minor, a Class B misdemeanor/Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The terms "alcoholic beverage," "minor," and "proximate cause" are defined. See I.C. 7.1-1-3-5 and I.C. 7.1-1-3-25; Instruction Nos. 14.09.5, 14.134, and 14.166.

Trial of furnishing an alcoholic beverage to a minor as a Class A misdemeanor for having a prior conviction of the offense must be bifurcated. The Committee has not drafted a pattern for the bifurcated proceeding, but suggests that the general recidivist pattern for prior conviction enhancements in Chapter 15 be used.



**Instruction No. 7.501. Abandonment of an Animal.**

I.C. 35-46-3-7,

I.C. 35-46-3-0.5.

The crime of abandonment of an animal is defined by law as follows:

A person who has a vertebrate animal in the person's custody and recklessly, knowingly, or intentionally [deserts the animal] [leaves the animal permanently in a place without making provision for adequate long term care of the animal] commits abandonment of an animal, a Class A misdemeanor. [It is a defense that the person reasonably believed that the vertebrate animal was capable of surviving on its own.]

[(When defense is raised) The Defendant has raised the reasonable belief of survival defense. To prove this defense, the Defendant has the burden to prove that it was more likely than not that [he] [she] reasonably believed the animal was capable of surviving on its own.]

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. had (*describe animal as alleged in charging instrument*), which was a vertebrate animal, in (his) (her) custody, and
3. (recklessly) (knowingly) (intentionally)
4. [deserted the animal]

[or]

[left the animal permanently in a place without making provision for adequate long term care of the animal].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of abandonment of an animal, a Class A misdemeanor charged in Count \_\_\_\_\_.

[(When defense is raised) If you find that the State proved each of the elements beyond a reasonable doubt, but you also find that Defendant proved that it was more likely than not that [he] [she] reasonably believed the animal was capable of surviving on its own, you must find the Defendant not guilty of abandonment of an animal, a Class A misdemeanor charged in Count \_\_\_\_\_.]

**Comments**

This crime is a Class D Felony if the Defendant has a previous, unrelated conviction under I.C. 35-46-3. The prior conviction must be alleged on a separate sheet of the charging instrument and the trial must be bifurcated. Use Instruction No. 15.68d for this recidivist proceeding.

The Committee concludes that placing the defense of reasonable belief the animal could survive on the Defendant does not require the negation of an element of the crime. *See Moon v. State*, 832 N.E.2d 710 (Ind. Ct. App. 1996).

Consequently, the Committee has recommended placing the burden on the Defendant to prove the defense, by a preponderance of the evidence.

There is an exemption to the offense for a person employed by an animal facility who euthanizes an injured, sick, homeless, or unwanted domestic animal in accordance with the facility rules. I.C. 35-46-3-12(a). This exemption is, in the Committee's opinion, the Defendant's to prove by a preponderance of the evidence. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001).

The statute describes the offense of abandoning or neglecting an animal here as "cruelty to an animal," but because "cruelty to an animal" is also used to describe the I.C. 35-46-3-12(b) offense of beating a vertebrate animal the Committee has avoided the use of "cruelty to an animal" to avoid confusion.

The statute also provides that "an animal that is feral is not in a person's custody."



**Instruction No. 7.505. Neglect of an Animal.**

**I.C. 35-46-3-7,**

**I.C. 35-46-3.0.5.**

The crime of neglect of an animal is defined by law as follows:

A person who has a vertebrate animal in the person's custody and recklessly, knowingly, or intentionally:

[endangers an animal's health by failing to provide or arrange to provide the animal with food or drink, if the animal is dependent upon the person for the provision of food or drink]

[or]

[restrains an animal for more than a brief period in a manner that endangers the animal's life or health by the use of a rope, chain, or tether that:

(is less than three (3) times the length of the animal)

[or]

(is too heavy to permit the animal to move freely)

[or]

(causes the animal to choke]

[or]

[restrains an animal in a manner that seriously endangers the animal's life or health]

[or]

[fails to (provide reasonable care for) (seek veterinary care for) an injury or illness to a dog or cat that seriously endangers the life or health of the dog or cat]

[or]

[leaves a dog or cat outside and exposed to (excessive heat without providing the animal with a means of shade from the heat) (excessive cold if the animal is not provided with straw or another means of protection from the cold), regardless of whether the animal is restrained or kept in a kennel]

commits neglect of an animal, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. had (*describe animal as alleged in charging instrument*), which was a vertebrate animal, in (his) (her) custody, and
3. (recklessly) (knowingly) (intentionally)

4. [endangered the health of (*describe animal alleged*), an animal, by failing to provide or arrange to provide the animal with food or drink, when the animal was dependent upon the Defendant for the provision of food or drink;]

[or]

[restrained (*describe animal as alleged in charging instrument*), an animal, for more than a brief period in a manner that endangered the animal's life or health by the use of a rope, chain, or tether that:

[was less than three (3) times the length of the animal]

[or]

(is too heavy to permit the animal to move freely)

[or]

[caused the animal to choke]

[or]

[restrained (*describe animal alleged*), an animal, in a manner that seriously endangered the animal's life or health]

[or]

[failed to (provide reasonable care for) (seek veterinary care for) an injury or illness to (*describe dog or cat alleged*), a (dog) (cat), that seriously endangered the life or health of the (dog) (cat)]

[or]

[left (*describe dog or cat alleged*), a (dog) (cat), outside and exposed to:

(excessive heat without providing the animal with a means of shade from the heat)

[or]

(excessive cold if the animal is not provided with straw or another means of protection from the cold)

regardless of whether the animal was restrained or kept in a kennel]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of neglect of an animal, a Class A misdemeanor charged in Count \_\_\_\_\_.

### Comments

This crime is a Class D Felony if the Defendant has a previous, unrelated conviction under I.C. 35-46-3. The prior conviction must be alleged on a separate sheet of the charging instrument and the trial must be bifurcated. Use Instruction No. 15.68d for this recidivist proceeding.

There is an exemption to the offense for a person employed by an animal



facility who euthanizes an injured, sick, homeless, or unwanted domestic animal in accordance with the facility rules. I.C. 35-46-3-12(a). This exemption is, in the Committee's opinion, the Defendant's to prove by a preponderance of the evidence. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001).

The statute describes the offense of neglecting an animal here as "cruelty to an animal," but because "cruelty to an animal" is also used to describe the I.C. 35-46-3-12(b) offense of beating a vertebrate animal the Committee has avoided the use of "cruelty to an animal" to avoid confusion.

The statute also provides that "an animal that is feral is not in a person's custody."

**Instruction No. 7.510. Beating a Vertebrate Animal.****I.C. 35-46-3-12(b).**

The crime of beating a vertebrate animal is defined by law as follows:

A person who knowingly or intentionally beats a vertebrate animal commits a Class A misdemeanor. [The offense is a Class D felony if the person committed it with the intent to threaten, intimidate, coerce, harass, or terrorize a family or household member.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. beat
4. (*describe animal as alleged in charging instrument*), a vertebrate animal.
- [5. (*for Class D felony*) and the Defendant committed elements 1, 2, 3, and 4 above with the intent to [threaten] [intimidate] [coerce] [harass] [terrorize] [*name alleged family or household member*], who was a family or household member of the Defendant].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of beating a vertebrate animal, a Class A misdemeanor/Class D felony, charged in Count \_\_\_\_\_.

**Comments**

This crime is a Class D Felony if the Defendant has a previous, unrelated conviction under I.C. 35-46-3-12. The prior conviction must be alleged on a separate sheet of the charging instrument and the trial must be bifurcated. Use Instruction No. 15.68c.

There is a defense to the crime for conduct to protect persons or property or to avoid prolonging animal suffering or to train, handle, or discipline the animal. To instruct on this defense, use Instruction No. 7.580.

There is an exemption to the offense for a person employed by an animal facility who euthanizes an injured, sick, homeless, or unwanted domestic animal in accordance with the facility rules. I.C. 35-46-3-12(a). This exemption is, in the Committee's opinion, the Defendant's to prove by a preponderance of the evidence. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001).

The statute describes the offense of beating a vertebrate animal here as "cruelty to an animal," but because "cruelty to an animal" is also used to describe the I.C. 35-46-3-7 offense of abandoning or neglecting an animal the Committee has avoided the use of "cruelty to an animal" to avoid confusion.



**Instruction No. 7.520. Torture or Mutilation of a Vertebrate Animal.****I.C. 35-46-3-12(c).**

The crime of [torture] [mutilation] of a vertebrate animal is defined by law as follows:

A person who knowingly or intentionally [tortures] [mutilates] a vertebrate animal commits torturing or mutilating a vertebrate animal, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. (tortured)  
(or)  
(mutilated)]
4. (*describe animal as alleged in charging instrument*), which was a vertebrate animal.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [torture] [mutilation] of a vertebrate animal, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The terms “mutilate” and “torture” are defined by law. See I.C. 35-46-3-0.5; Instruction Nos. 14.138 and 14.204.5.

There is a defense to the crime for conduct to protect persons or property or to avoid prolonging animal suffering or to train, handle, or discipline the animal. To instruct on this defense, use Instruction No. 7.580.

There is an exemption to the offense for a person employed by an animal facility who euthanizes an injured, sick, homeless, or unwanted domestic animal in accordance with the facility rules. I.C. 35-46-3-2(a). This exemption is, in the Committee’s opinion, the Defendant’s to prove by a preponderance of the evidence. See *Harris v. State*, 716 N.E.2d 406 (Ind. 1999); *Armstrong v. State*, 742 N.E.2d 972 (Ind. Ct. App. 2001).

**Instruction No. 7.525. Killing a Domestic Animal.****I.C. 35-46-3-12.5.**

The crime of killing a domestic animal is defined by law as follows:

A person who knowingly or intentionally kills a domestic animal without the consent of the owner of the domestic animal commits killing a domestic animal, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. killed
4. (*describe animal as alleged in charging instrument*), which was a domestic animal
5. without the consent of (*name individual*)
6. when (*name individual*) was the owner of the domestic animal.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of killing a domestic animal, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term "domestic animal" is defined by law. See I.C. 35-46-3-12(d); Instr. No. 14.70.

There is a defense to the crime for conduct to protect persons or property or to avoid prolonging animal suffering or to train, handle, or discipline the animal. To instruct on this defense, use Instruction No. 7.580.



**Instruction No. 7.527. Domestic Violence Animal Cruelty.****I.C. 35-46-3-12.5.**

The crime of domestic violence animal cruelty is defined by law as follows:

A person who knowingly or intentionally kills a vertebrate animal with the intent to [threaten] [intimidate] [coerce] [harass] [terrorize] a family or household member commits domestic violence animal cruelty, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. killed (*describe animal as alleged in charging instrument*), a vertebrate animal
4. with the intent to
  - [threaten]
  - [or]
  - [intimidate]
  - [or]
  - [coerce]
  - [or]
  - [harass]
  - [or]
  - [terrorize]

(*name alleged person*), who was at the time a (family) (household) member of the Defendant.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of domestic violence animal cruelty, a Class D felony, charged in Count \_\_\_\_\_.

**Instruction No. 7.530. Purchase or Possession of Animals for Fighting Contests.**

**I.C. 35-46-3-8.**

The crime of [purchase] [possession] of animals for fighting contests is defined by law as follows:

A person who knowingly or intentionally [purchases] [possesses] an animal for the purpose of using the animal in an animal fighting contest commits a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [purchased]  
[or]  
[possessed]
4. (*describe animal as alleged in charging instrument*), an animal
5. for the purpose of using the animal in an animal fighting contest.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [purchase] [possession] of animals for fighting contests, a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term "animal fighting contest" is defined by law. See I.C. 35-46-3-4; Instr. No. 14.09.07.



**Instruction No. 7.532. Possession of Animal Fighting Paraphernalia.****I.C. 35-46-3-8.5.**

The crime of possession of animal fighting paraphernalia is defined by law as follows:

A person who knowingly or intentionally possesses animal fighting paraphernalia with the intent to commit a violation of IC 35-46-3-9, [promoting or staging an animal fighting contest] [using an animal in a fighting contest] [attending an animal fighting contest having an animal in the person's possession], commits possession of animal fighting paraphernalia, a Class B misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. possessed
4. (*describe alleged paraphernalia*), which was animal fighting paraphernalia
5. with the intent to commit a violation of IC 35-46-3-9 by  
[promoting or staging an animal fighting contest]  
[or]  
[using an animal in a fighting contest]  
[or]  
[attending an animal fighting contest having an animal in the Defendant's possession].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of animal fighting paraphernalia, a Class B misdemeanor, charged in Count \_\_\_\_\_.

**Comments**

The terms "animal fighting contest" and "animal fighting paraphernalia" are defined by law. See I.C. 35-46-3-4 and I.C. 35-46-3-4.3; Instr. Nos. 14.09.07 and 14.09.08.

This crime is a Class A misdemeanor if the Defendant has a previous, unrelated conviction under I.C. 35-46-3-8.5. The prior conviction must be alleged on a separate sheet of the charging instrument and the trial must be bifurcated. Use Instruction No. 14.156.03.

**Instruction No. 7.535. Promoting Animal Fighting Contest. Using Animal at Contest. Attending Contest With Animal.**

**I.C. 35-46-3-9.**

The crime of [promoting or staging an animal fighting contest] [using an animal in a fighting contest] [attending an animal fighting contest having an animal] is defined by law as follows:

A person who knowingly or intentionally [promotes or stages an animal fighting contest] [uses an animal in a fighting contest] [attends an animal fighting contest having an animal in the person's possession] commits [promoting or staging an animal fighting contest] [using an animal in a fighting contest] [attending an animal fighting contest having an animal], a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [(promoted or staged) an animal fighting contest]

[or]

[used an animal in a fighting contest]

[or]

[attended an animal fighting contest having an animal in the Defendant's possession].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [promoting or staging an animal fighting contest] [using an animal in a fighting contest] [attending an animal fighting contest having an animal], a Class D felony, charged in Count \_\_\_\_\_.

**Comments**

The term "animal fighting contest" is defined by law. See I.C. 35-46-3-4; Instr. No. 14.09.07.



**Instruction No. 7.537. Promoting Animal Fighting Contest.****I.C. 35-46-3-9.5.**

The crime of promoting an animal fighting contest is defined by law as follows:

A person who knowingly or intentionally possesses animal fighting paraphernalia with the intent to commit a violation of IC 35-46-3-9, by [promoting or staging an animal fighting contest] [using an animal in a fighting contest] [attending an animal fighting contest having an animal in the person's possession], and [possesses] [harbors] [trains] a [dog] [cock] [fowl] [bird] bearing [a scar] [a wound] [an injury] consistent with [participation in] [training for] an animal fighting contest, commits promoting an animal fighting contest, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. possessed (*describe alleged paraphernalia*), which was animal fighting paraphernalia
4. with the intent to commit a violation of IC 35-46-3-9 by
  - [promoting or staging an animal fighting contest]
  - [or]
  - [using an animal in a fighting contest]
  - [or]
  - [attending an animal fighting contest while having an animal in the Defendant's possession]
5. while the Defendant [possessed] [harbored] [trained] a
  - [dog]
  - [or]
  - [cock]
  - [or]
  - [fowl]
  - [or]
  - [bird]

which was bearing a

[scar]

[or]

*(Text continued on page 7-159)*



IN RE: [Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

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[Illegible]

[Illegible]

[Illegible]

[Illegible]

[wound]

[or]

[injury]

which was consistent with [participating in] [training for] an animal fighting contest.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of promoting an animal fighting contest, a Class D felony, charged in Count \_\_\_\_\_.

#### Comments

The terms "animal fighting contest" and "animal fighting paraphernalia" are defined by law. See I.C. 35-46-3-4 and I.C. 35-46-3-4.3; Instr. Nos. 14.09.07 and 14.09.08.



**Instruction No. 7.540. Mistreatment or Interference With Law Enforcement Animal.****I.C. 35-46-3-11.**

The crime of [mistreating] [interfering with] a law enforcement animal is defined by statute as follows:

A person who [knowingly] [intentionally] [(strikes) (torments) (injures) (otherwise mistreats) a law enforcement animal] [interferes with the actions of a law enforcement animal while the animal is engaged in assisting a law enforcement officer in the performance of the officer's duties] commits [mistreating] [interfering with] a law enforcement animal, a Class A misdemeanor. [The crime is a Class D felony if it results in (serious permanent disfigurement) (unconsciousness) (permanent or protracted loss or impairment of the function of a bodily member or organ) (death) of the law enforcement animal.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally

[3. (struck)

[or]

(tormented)

[or]

(injured)

[or]

(mistreated)

(*describe alleged law enforcement animal*), which was a law enforcement animal]

[or]

[3. interfered with the actions of (*describe alleged law enforcement animal*), a law enforcement animal, while the animal was engaged in assisting (*name alleged law enforcement officer*), who was a law enforcement officer, while (*name alleged law enforcement officer*) was engaged in the performance of the officer's duties]

[4. (*for Class D felony*) and the Defendant's act resulted in (serious permanent disfigurement) (unconsciousness) (permanent or protracted loss or impairment of the function of a bodily member or organ) (death) of (*describe alleged law enforcement animal*), a law enforcement animal].

If the State failed to prove each of these elements beyond a reasonable doubt, you

must find the Defendant not guilty of [mistreating] [interfering with] a law enforcement animal, a Class A misdemeanor/D felony, charged in Count \_\_\_\_\_.

### Comments

The term "law enforcement animal" is defined by law. See I.C. 35-46-3-4.5; Instr. No. 14.122.



**Instruction No. 7.542. Mistreatment or Interference With Search and Rescue Dog****I.C. 3**

The crime of [mistreating] [interfering with] a search and rescue dog is defined by statute as follows:

A person who [knowingly] [intentionally] [(strikes) (torments) (injures) (otherwise mistreats) a search and rescue dog] [interferes with the actions of a search and rescue dog while the dog is performing or attempting to perform a search and rescue task] commits [mistreating] [interfering with] a search and rescue dog, a Class A misdemeanor. [The crime is a Class D felony if the act results in (serious permanent disfigurement) (unconsciousness) (permanent or protracted loss or impairment of the function of a bodily member or organ) (death) of the search and rescue dog.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
- [3. (struck)  
(or)  
(tormented)  
(or)  
(injured)  
(or)  
(mistreated)  
(*describe alleged search and rescue dog*), which was a search and rescue dog]  
[or]
- [3. interfered with the actions of (*describe alleged search and rescue dog*), a search and rescue dog, while the animal was performing or attempting to perform a search and rescue task]
- [4. (*for Class D felony*) and the Defendant's act resulted in (serious permanent disfigurement) (unconsciousness) (permanent or protracted loss or impairment of the function of a bodily member or organ) (death) of (*describe alleged search and rescue dog*), a search and rescue dog].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [mistreating] [interfering with] a search and rescue dog, a Class A misdemeanor/D felony, charged in Count \_\_\_\_\_.

**Comments**

The term "search and rescue dog" is defined by law. See I.C. 35-46-3-11.3; Instr. No. 14.184.5.

Statute provides that it is a defense that the Defendant engaged in a reasonable act of training, handling, or disciplining the search and rescue dog; or reasonably believed the conduct was necessary to prevent injury to the accused person or another person. The Committee believes that the Defendant has the burden to prove this defense by a preponderance of the evidence. See *Moon v. State*, 832 N.E.2d 710 (Ind. Ct. App. 1996).



**Instruction No. 7.544. Interference With or Mistreatment of Service Animal.**

**I.C. 35-46-3-11.5.**

The crime of [mistreating] [interfering with] a service animal is defined by statute as follows:

A person who [knowingly] [intentionally] [(strikes) (torments) (injures) (otherwise mistreats) a service animal] [interferes with the actions of a service animal] while the service animal is engaged in assisting a person who is impaired by [blindness or any other visual impairment] [deafness or any other aural impairment] [a physical disability] [a medical condition] commits [mistreating] [interfering with] a service animal, a Class A misdemeanor. [The crime is a Class D felony if the act results in (serious permanent disfigurement) (unconsciousness) (permanent or protracted loss or impairment of the function of a bodily member or organ) (death) of the search and rescue dog.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally

[3. (struck)

[or]

(tormented)

[or]

(injured)

[or]

(mistreated)

(*describe alleged service animal*), which was a service animal]

[or]

[3. interfered with the actions of (*describe alleged service animal*), which was a service animal]

[4. while the animal was engaged in assisting (*name alleged impaired person*), a person impaired by:

[blindness or any other visual impairment]

[deafness or any other aural impairment]

[a physical disability]

[a medical condition]

[5. (*for Class D felony*) and the Defendant's act resulted in (serious permanent disfigurement) (unconsciousness) (permanent or protracted loss or impair-

ment of the function of a bodily member or organ) (death) of (*describe alleged service animal*), a service animal].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [mistreating] [interfering with] a service animal, a Class A misdemeanor/D felony, charged in Count \_\_\_\_\_.

### Comments

The term "service animal" is defined by law. See I.C. 35-46-3-11.5; Instr. No. 14.190.7.

Statute provides that it is a defense that the Defendant engaged in a reasonable act of training, handling, or disciplining the search and rescue dog; or reasonably believed the conduct was necessary to prevent injury to the accused person or another person. The Committee believes that the Defendant has the burden to prove this defense by a preponderance of the evidence. See *Moon v. State*, 832 N.E.2d 710 (Ind. Ct. App. 1996).



**Instruction No. 7.580. Defense of Reasonable Conduct Toward Animal.**

**I.C. 35-46-3-12(e).**

It is a defense that the accused person:

(reasonably believed the conduct was necessary to {prevent injury to the accused person or another person} {protect the property of the accused person from destruction or substantial damage} {prevent a seriously injured vertebrate animal from prolonged suffering})

(or)

(engaged in a reasonable and recognized act of training, handling, or disciplining the vertebrate animal).]

The Defendant has the burden to prove this defense by a preponderance of the evidence.

You may not convict the Defendant if the Defendant proves by a preponderance of the evidence:

1. The Defendant

[2. reasonably believed [his] [her] conduct was necessary to

{prevent injury to [Defendant] [another person]}

[or]

{protect the Defendant's property from destruction or substantial damage}

[or]

{prevent a seriously injured [describe animal as alleged in charging instrument], a vertebrate animal, from prolonged suffering}}

[or]

[2. was engaged in a reasonable and recognized act of training, handling, disciplining the [describe animal as alleged in charging instrument)].

If the Defendant proved all these aspects of the defense by a preponderance of the evidence, you cannot find the Defendant guilty of (*insert name of offense*), in Count (*insert count number*).

**Comments**

This statutory defense does not negate an element of the crime, and consequently the burden to prove it by a preponderance is placed upon the Defendant. See the "Note on Allocation of Burden of Persuasion" at the beginning of Chapter 10, which quotes *Moon v. State*, 832 N.E.2d 710 (Ind. Ct. App. 1996).

# **CHAPTER 8**

## **CONTROLLED SUBSTANCES**

### **SYNOPSIS**

- Instruction No. 8.01. Dealing in Cocaine or a Narcotic Drug.**
- Instruction No. 8.01.1. Dealing in Methamphetamine.**
- Instruction No. 8.03. Dealing in a Schedule I, II, or III Controlled Substance.**
- Instruction No. 8.03a. Dealing in a Controlled Substance Analog.**
- Instruction No. 8.05. Dealing in a Schedule IV Controlled Substance.**
- Instruction No. 8.07. Dealing in a Schedule V Controlled Substance.**
- Instruction No. 8.09. Dealing in Substance Represented to Be Controlled Substance.**
- Instruction No. 8.11. Manufacture or Distribution of Substance Represented to Be Controlled Substance.**
- Instruction No. 8.15. Possession of Cocaine or a Narcotic Drug.**
- Instruction No. 8.15.1. Possession of Methamphetamine.**
- Instruction No. 8.17. Possession of a Controlled Substance.**
- Instruction No. 8.17a. Possession of a Controlled Substance Analog.**
- Instruction No. 8.19. Possession of a Schedule V Codeine Controlled Substance.**
- Instruction No. 8.20a. Possessing Ammonia or Solution With Intent to Manufacture Methamphetamine.**
- Instruction No. 8.20b. Possessing Reagents or Precursors with Intent to Manufacture Controlled Substance.**
- Instruction No. 8.20c. Possessing Ephedrine, Pseudoephedrine or Phenylpropanolamin.**
- Instruction No. 8.20d. Unlawful Sale of a Precursor.**
- Instruction No. 8.20e. Possession of Precursor by a Methamphetamine Offender.**
- Instruction No. 8.23. Manufacture of Paraphernalia.**
- Instruction No. 8.25. Dealing in Paraphernalia.**
- Instruction No. 8.27. Reckless Dealing in Paraphernalia.**
- Instruction No. 8.29. Possession of Paraphernalia.**
- Instruction No. 8.31. Reckless Possession of Paraphernalia.**
- Instruction No. 8.33. Dealing in Marijuana, Hash Oil, Hashish, or Salvia.**
- Instruction No. 8.33.2. Dealing in a Synthetic Drug or Synthetic Drug Lookalike Substance (Infraction).**
- Instruction No. 8.33.3. Dealing in a Synthetic Drug or Synthetic Drug Lookalike Substance**



## (Crime).

- Instruction No. 8.35. Possession of Marijuana, Hash Oil, Hashish, or Salvia.
- Instruction No. 8.35a. Exposure of a Minor or Endangered Adult to Drugs or Controlled Substances.
- Instruction No. 8.37. Maintaining a Common Nuisance.
- Instruction No. 8.39. Distribution in Violation of I.C. 35-48-3.
- Instruction No. 8.41. Manufacture or Distribution Unauthorized by Registration.
- Instruction No. 8.43. Failure to Document.
- Instruction No. 8.45. Refusal of Inspection.
- Instruction No. 8.47. Distribution Without an Order Form.
- Instruction No. 8.49. Use of Fictitious Registration Number.
- Instruction No. 8.51. False Documentation.
- Instruction No. 8.53. Counterfeit Trademarking.
- Instruction No. 8.55. Possession of a Controlled Substance by Misrepresentation.
- Instruction No. 8.57. False Labeling of a Controlled Substance.
- Instruction No. 8.59. Unlawful Duplication of Prescription Pads.

(Text continued on page 8-3)

**Instruction No. 8.01. Dealing in Cocaine or a Narcotic Drug.****I.C. 35-48-4-1.**

The crime of dealing in [cocaine] [a narcotic drug] is defined by statute as follows:

A person who {knowingly or intentionally [manufactures] [finances the manufacture of] [delivers] [finances the delivery of]} {possesses with intent to [manufacture] [finance the manufacture of] [deliver] [finance the delivery of]} [cocaine, pure or adulterated] [a narcotic drug, pure or adulterated, classified in schedule I or II], commits dealing in [cocaine] [a narcotic drug], a Class B felony. [The offense is a Class A felony if (the amount of the drug involved weighs three (3) grams or more) (the person delivered or financed the delivery of the drug to a person under eighteen (18) years of age at least three years junior to the person) (the person delivered or financed the delivery of the drug on a school bus or in, on, or within one thousand (1,000) feet of school property or a public park or a family housing complex or a youth program center).]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant

{2. knowingly or intentionally

[manufactured]

[or]

[financed the manufacture of]

[or]

[delivered]

[or]

[financed the delivery of] }

{or} [2. \* [possessed, with intent to manufacture or deliver]

[or]

[possessed with intent to finance the manufacture or delivery of] }

3. [cocaine, pure or adulterated]

[or]

[(*name drug*), a narcotic drug, pure or adulterated], which the Court instructs you is classified by statute as a controlled substance in schedule I or II.

[4. and (*for A felony*)



[the amount of the drug involved weighed three (3) grams or more]

[or]

[the Defendant delivered or financed the delivery of the drug to (name), who was then under eighteen (18) years of age and at least three (3) years junior to the Defendant]

[or]

[the Defendant delivered or financed the delivery of the drug

[on a school bus]

[or]

[in, on or within one thousand (1,000) feet of

[school property]

[or]

[a public park]

[or]

[a family housing complex]

[or]

[a youth program center]]].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of dealing in [cocaine] [a narcotic drug], a Class B/A felony.

### Comments

The terms “cocaine,” “controlled substance,” “delivery,” “manufacture,” “narcotic drug,” “public park,” “school property,” “school bus,” “family housing complex” and “youth program center” are defined by law. See I.C. 35-48-1-7, I.C. 35-48-1-9, I.C. 35-48-1-11, I.C. 35-48-1-18, I.C. 35-48-1-20, I.C. 35-41-1-23.7, I.C. 35-41-1-4.7, I.C. 35-41-1-24.3, I.C. 35-41-1-10.5 and 35-41-1-29; Instruction Nos. 14.19, 14.31, 14.51, 14.129, 14.139, 14.166a, 14.181, 14.183, 14.83a and 14.221.

\*The Committee notes that a “knowingly or intentionally” element might be implied for these possession versions of the offense, although knowledge of the nature of the things possessed is implicit in the “with intent to manufacture or deliver” language of the possession offenses.

It is not necessary for the jury to determine whether the substance is classified as a controlled substance on a particular schedule. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).

The Committee notes it has been held that knowledge or intent as to the school, park, family housing, or youth program center proximity enhancement factors is not required. *Walker v. State*, 668 N.E.2d 243 (Ind. 1996).



**Instruction No. 8.01.1. Dealing in Methamphetamine.****I.C. 35-48-4-1.1.**

The crime of dealing in [methamphetamine] is defined by statute as follows:

A person who knowingly or intentionally [manufactures] [finances the manufacture of] [delivers] [finances the delivery of] [possesses with intent to manufacture] [possesses with intent to deliver] [possesses with intent to finance the manufacture of] [possesses with intent to finance the delivery of] methamphetamine, pure or adulterated, commits dealing in methamphetamine, a Class B felony. [The offense is a Class A felony if

(the amount of the drug involved weighs three (3) grams or more)

(or)

(the person delivered or financed the delivery of the drug to a person under eighteen (18) years of age at least three years junior to the person)

(or)

(the person manufactured or delivered or financed the delivery of the drug

[on a school bus]

[or]

[in, on, or within one thousand (1,000) feet of

(school property)

(or)

(a public park)

(or)

(a family housing complex)

(or)

(a youth program center)]).

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant

{2. knowingly or intentionally

[manufactured]

[or]

[financed the manufacture of]

[or]

[delivered]

[or]

[financed the delivery of]

[or]

[possessed with intent to manufacture]

[or]

[possessed with intent to deliver]

[or] [possessed with intent to finance the manufacture of]

[or]

[possessed with intent to finance the delivery of]

3. methamphetamine, pure or adulterated

[4. and (*for A felony*)

[the amount of the methamphetamine involved weighed three (3) grams or more]

[or]

[the Defendant delivered or financed the delivery of the methamphetamine to (*name*), who was then under eighteen (18) years of age and at least three (3) years junior to the Defendant]

[or]

[the Defendant manufactured or delivered or financed the delivery of the methamphetamine

[on a school bus]

[or]

[in, on or within one thousand (1,000) feet of

(school property)

(or)

(a public park)

(or)

(a family housing complex)

(or)

(a youth program center)]]].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of dealing in methamphetamine, a Class B/A felony.

### Comments

The terms “delivery,” “manufacture,” “public park,” “school property,” “school



bus,” “family housing complex” and “youth program center” are defined by law. See I.C. 35-48-1-11, I.C. 35-48-1-18, I.C. 35-41-1-23.7, I.C. 35-41-1-4.7, I.C. 35-41-1-24.3, I.C. 35-41-1-10.5 and 35-41-1-29; Instruction Nos. 14.51, 14.129, 14.166a, 14.181, 14.183, 14.83a and 14.221.

\*The Committee notes that a “knowingly or intentionally” element might be implied for these possession versions of the offense, although knowledge of the nature of the things possessed is implicit in the “with intent to manufacture or deliver” language of the possession offenses.

The Committee notes it has been held that knowledge or intent as to the school, park, family housing, or youth program center proximity enhancement factors is not required. *Walker v. State*, 668 N.E.2d 243 (Ind. 1996).

**Instruction No. 8.03. Dealing in a Schedule I, II, or III Controlled Substance.****I.C. 35-48-4-2.**

The crime of dealing in a schedule I, II, or III controlled substance is defined by statute as follows:

A person who {knowingly or intentionally [manufactures] [finances the manufacture of] [delivers] [finances the delivery of]} {possesses with intent to [manufacture] [finance the manufacture of] [deliver] [finance the delivery of]} a controlled substance, pure or adulterated, classified in schedule I, II, or III, except marijuana, hash oil, or hashish, commits dealing in a schedule I, II, or III controlled substance, a Class B felony. (The offense is a Class A felony if the person delivered or financed the delivery of the drug [to a person under eighteen (18) years of age at least three years junior to the person] [on a school bus or in, on, or within one thousand (1,000) feet of school property or a public park, a family housing complex, or a youth program center]).

To convict the Defendant the State must have proved each of the following:

1. The Defendant

{2. knowingly or intentionally

[manufactured]

[or]

[financed the manufacture of]

[or]

[delivered]

[or]

[financed the delivery of]}

{or}

{2. \*[possessed, with intent to manufacture or deliver]

[or]

[possessed with intent to finance the manufacture or  
delivery of]}

3. [(*name substance*), a narcotic drug, pure or adulterated], which the Court instructs you is classified by statute as a controlled substance in schedule I, II, or III.

[4. and

[the Defendant delivered or financed the delivery of the drug to (*name*), who was then under eighteen (18) years of age and at least three (3) years junior to the Defendant]

(Text continued on page 8-9)



...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

[or]  
[the Defendant delivered or financed the delivery of the drug  
[on a school bus]  
[or]  
[in, on or within one thousand (1,000) feet of  
[school property]  
[or]  
[a public park]  
[or]  
[a family housing complex]  
[or]  
[a youth program center]]].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of dealing in a schedule I, II, or III controlled substance, a Class B/A felony.

### Comments

The terms “controlled substance,” “delivery,” “manufacture,” “public park,” “school bus,” “school property,” “family housing complex” and “youth program center” are defined by law. See I.C. 35-48-1-9, I.C. 35-48-1-11, I.C. 35-48-1-18, I.C. 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-10.5 and 35-41-1-29; Instruction Nos. 14.31, 14.51, 14.129, 14.166a, 14.181, 14.183, 14.83a and 14.221.

\*The Committee notes that a “knowingly or intentionally” element might be implied for these possession versions of the offense, although knowledge of the nature of the things possessed is implicit in the “with intent to manufacture or deliver” language of the possession offenses.

It is not necessary for the jury to determine whether the substance is classified as a controlled substance on a particular schedule. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).

The Committee notes it has been held that knowledge or intent as to the school, park, family housing, or youth program center proximity enhancement factor is not required. *Walker v. State*, 668 N.E.2d 243 (Ind. 1996).



**Instruction No. 8.03a. Dealing in a Controlled Substance Analog.****I.C. 35-48-4-2.**

The crime of dealing in a controlled substance analog is defined by statute as follows:

A person who knowingly or intentionally [manufactures] [finances the manufacture of] [delivers] [finances the delivery of] a controlled substance analog pure or adulterated, or possesses with intent to [manufacture] [finance the manufacture of] [deliver] [finance the delivery of] a controlled substance analog, pure or adulterated, commits dealing in a controlled substance analog, a Class B felony. (The offense is a Class A felony if the person delivered or financed the delivery of the analog [to a person under eighteen (18) years of age at least three years junior to the person] [on a school bus or in, on, or within one thousand (1,000) feet of school property or a public park, a family housing complex, or a youth program center]).

To convict the Defendant the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. [manufactured]

[or]

[financed the manufacture of]

[or]

[delivered]

[or]

[financed the delivery of]

[or]

[possessed, with intent to manufacture or deliver]

[or]

[possessed with intent to finance the manufacture or delivery of]

4. [name], a substance

which was intended, in whole or in part, for human consumption,

and

which was a controlled substance analog because:

its chemical structure was substantially similar to that of [name], a controlled substance included in schedule I or II and it had

[or]

Defendant (represented it as having) (intended it to have) a [narcotic] [stimulant] [depressant] [hallucinogenic] effect on the central nervous system substantially similar to or greater than the [narcotic] [stimulant] [depressant] [hallucinogenic] effect on the central nervous system of [name], a controlled substance included in schedule I or II

[5. and

[the Defendant delivered or financed the delivery of the analog to (name), who was then under eighteen (18) years of age and at least three (3) years junior to the Defendant]

[or]

[the Defendant delivered or financed the delivery of the analog

[on a school bus]

[or]

[in, on or within one thousand (1,000) feet of

[school property]

[or]

[a public park]

[or]

[a family housing complex]

[or]

[a youth program center]]].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of dealing in a controlled substance analog, a Class B/A felony.

### Comments

The terms “delivery,” “manufacture,” “public park,” “school bus,” “school property,” “family housing complex” and “youth program center” are defined by law. See I.C. 35-48-1-11, I.C. 35-48-1-18, I.C. 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-10.5 and 35-41-1-29; Instruction Nos. 14.51, 14.129, 14.166a, 14.181, 14.183, 14.83a and 14.221.

It is not necessary for the jury to determine that the substance to which the analog is similar in chemical structure and effect on the nervous system is classified as a controlled substance on a particular schedule. The Court does this, as a matter of law. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).



The Committee notes it has been held that knowledge or intent as to the school, park, family housing, or youth program center proximity enhancement factor is not required. *Walker v. State*, 668 N.E.2d 243 (Ind. 1996).

Under I.C. 35-48-1-9.3, the term “controlled substance analog” “does not include”:

- (1) a controlled substance;
- (2) a substance for which there is an approved new drug application;
- (3) a substance for which an exemption is in effect for investigational use by a person under Section 505 of the federal Food, Drug and Cosmetic Act (chapter 675, 52 Stat. 1052 (21 U.S.C. 355)), to the extent that conduct with respect to the substance is permitted under the exemption; or
- (4) a substance to the extent not intended for human consumption before an exemption takes effect regarding the substance.

The Committee believes that this “does not include” list are exceptions to liability which the Defendant must prove by a preponderance. See *Gilbert v. State*, 426 N.E.2d 1333 (Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982). If the Defendant presents evidence of one of these exceptions, a separate instruction should be given on it, advising the jury that the crime “does not include” manufacturing, financing, delivering, etc. the substance subject to the exception and that the burden is on the Defendant to prove by a preponderance that the exception applies.

(Text continued on page 8-13)

**Instruction No. 8.05. Dealing in a Schedule IV Controlled Substance.****I.C. 35-48-4-3.**

The crime of dealing in a schedule IV controlled substance is defined by statute as follows:

A person who {knowingly or intentionally [manufactures] [finances the manufacture of] [delivers] [finances the delivery of]} {possesses with intent to [manufacture] [finance the manufacture of] [deliver] [finance the delivery of]} a controlled substance, pure or adulterated, classified in schedule IV commits dealing in a schedule IV controlled substance, a Class C felony. (The offense is a Class B felony if the person delivered or financed the delivery of the drug [to a person under eighteen (18) years of age at least three years junior to the person] [on a school bus or in, on, or within one thousand (1,000) feet of school property or a public park, a family housing complex, or a youth program center]).

To convict the Defendant, the State must have proved each of the following:

1. The Defendant

{2. knowingly or intentionally

[manufactured]

[or]

[financed the manufacture of]

[or]

[delivered]

[or]

[financed the delivery of]}

{or}

{2. \* [possessed, with intent to manufacture or deliver]

[or]

[possessed with intent to finance the manufacture or delivery of]}

3. [(name substance), pure or adulterated], which the court instructs you is classified by statute as a controlled substance in schedule IV.

[4. and

[the Defendant delivered or financed the delivery of the drug to (name), who was then under eighteen (18) years of age and at least three (3) years junior to the Defendant]

[or]

[the Defendant delivered or financed the delivery of the drug



[on a school bus]  
[or]  
[in, on or within one thousand (1,000) feet of  
[school property]  
[or]  
[a public park]  
[or]  
[a family housing complex]  
[or]  
[a youth program center]]].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of dealing in a schedule IV controlled substance, a Class C/B felony.

### Comment

The terms “controlled substance,” “delivery,” “manufacture,” “public park,” “school bus,” “school property,” “family housing complex” and “youth program center” are defined by law. See I.C. 35-48-1-9, I.C. 35-48-1-11, I.C. 35-48-1-18, I.C. 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-10.5 and 35-41-1-29; Instruction Nos. 14.31, 14.51, 14.129, 14.166a, 14.181, 14.183, 14.83a and 14.221.

\*The Committee notes that a “knowingly or intentionally” element might be implied for these possession versions of the offense, although knowledge of the nature of the things possessed is implicit in the “with intent to manufacture or deliver” language of the possession offenses.

It is not necessary for the jury to determine whether the substance is classified as a controlled substance on a particular schedule. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).

The Committee notes it has been held that knowledge or intent as to the school, park, family housing, or youth program center proximity enhancement factor is not required. *Walker v. State*, 668 N.E.2d 243 (Ind. 1996).

**Instruction No. 8.07. Dealing in a Schedule V Controlled Substance.****I.C. 35-48-4-4.**

The crime of dealing in a schedule V controlled substance is defined by statute as follows:

A person who {knowingly or intentionally [manufactures] [finances the manufacture of] [delivers] [finances the delivery of]} {possesses with intent to [manufacture] [finance the manufacture of] [deliver] [finance the delivery of]} a controlled substance, pure or adulterated, classified in schedule V commits dealing in a schedule V controlled substance, a Class D felony. (The offense is a Class B felony if the person delivered or financed the delivery of the drug [to a person under eighteen (18) years of age at least three years junior to the person] [on a school bus or in, on, or within one thousand (1,000) feet of school property or a public park, a family housing complex, or a youth program center]).

To convict the Defendant, the State must have proved each of the following:

1. The Defendant

{2. knowingly or intentionally

[manufactured]

[or]

[financed the manufacture of]

[or]

[delivered]

[or]

[financed the delivery of]}

{or}

{2. \*[possessed, with intent to manufacture or deliver]

[or]

[possessed with intent to finance the manufacture or delivery of]}

3. [(name substance), pure or adulterated], which the court instructs you is classified by statute as a controlled substance in schedule V.

[4. and

[the Defendant delivered or financed the delivery of the drug to (name), who was then under eighteen (18) years of age and at least three (3) years junior to the Defendant]

[or]

[the Defendant delivered or financed the delivery of the drug



[on a school bus]  
 [or]  
 [in, on or within one thousand (1,000) feet of  
     [school property]  
     [or]  
     [a public park]  
     [or]  
     [a family housing complex]  
     [or]  
     [a youth program center]]].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of dealing in a schedule V controlled substance, a Class C/B felony.

### Comment

The terms “controlled substance,” “delivery,” “manufacture,” “public park,” “school bus,” “school property,” “family housing complex” and “youth program center” are defined by law. See I.C. 35-48-1-9, I.C. 35-48-1-11, I.C. 35-48-1-18, I.C. 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-10.5 and 35-41-1-29; Instruction Nos. 14.31, 14.51, 14.129, 14.166a, 14.181, 14.183, 14.83a and 14.221.

\*The Committee notes that a “knowingly or intentionally” element might be implied for these possession versions of the offense, although knowledge of the nature of the things possessed is implicit in the “with intent to manufacture or deliver” language of the possession offenses.

It is not necessary for the jury to determine whether the substance is classified as a controlled substance on a particular schedule. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).

The Committee notes it has been held that knowledge or intent as to the school, park, family housing, or youth program center proximity enhancement factor is not required. *Walker v. State*, 668 N.E.2d 243 (Ind. 1996).

(Text continued on page 8-17)

**Instruction No. 8.09. Dealing in Substance Represented to Be Controlled Substance.**

**I.C. 35-48-4-4.5.**

The crime of dealing in a substance represented to be a controlled substance is defined by statute as follows:

A person who knowingly or intentionally delivers or finances the delivery of a substance [other than a controlled substance or a drug for which a prescription is required under federal or state law\*] that is expressly or impliedly represented to be a controlled substance, is distributed under circumstances that would lead a reasonable person to believe that the substance is a controlled substance, or by overall dosage unit appearance, including shape, color, size, markings, or lack of markings, taste, consistency, or any other identifying characteristic of the substance, would lead a reasonable person to believe the substance is a controlled substance, commits dealing in a substance represented to be a controlled substance, a Class D felony.

To convict the Defendant, the State must have proved each of the following elements:

1. The Defendant
2. knowingly or intentionally
3. [delivered]  
[or]  
[financed the delivery of]
4. a substance [other than a controlled substance or a drug for which a prescription was required under federal or state law\*] that  
[was expressly or impliedly represented to be (name substance), a controlled substance]  
[or]  
[was distributed under circumstances which would have led a reasonable person to believe that the substance was (name substance), a controlled substance]  
[or]  
[by overall dosage unit appearance, including shape, color, size, markings or lack of markings, taste, consistency, or other identifying physical characteristic of the substance, would have led a reasonable person to believe the substance was (name substance), a controlled substance.]

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of dealing in a substance represented to be a controlled substance, a Class D felony.



**Comments**

\*The Committee notes it is not certain whether this is an element the State must prove beyond a reasonable doubt or an exception the Defendant must prove by a preponderance. See *Gilbert v. State*, 426 N.E.2d 1333 (Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982).

The terms "controlled substance," "distribute," and "manufacture" are defined by law. See I.C. 35-48-1-9, I.C. 35-48-1-14, and I.C. 35-48-1-18; Instruction Nos. 14.31, 14.67, and 14.129.

Note that it has been held when the substance is represented to be marijuana, hash oil, or hashish, the court may not sentence the Defendant to a term greater than he or she would have received had the represented substance actually been marijuana, hash oil, or hashish. *Connor v. State*, 626 N.E.2d 803 (Ind. 1993). If this limit on the sentence to be imposed applies, the court may wish to delete reference in the instruction to the class of the crime.

**Instruction No. 8.11. Manufacture or Distribution of Substance Represented to Be Controlled Substance.**

**I.C. 35-48-4-4.6.**

The crime of manufacture or distribution of a substance represented to be a controlled substance is defined by statute as follows:

A person who knowingly or intentionally (manufactures) (finances the manufacture of) (advertises) (distributes) (possesses with intent to manufacture) (finance the manufacture of) (advertise) (distribute) a substance\* other than a controlled substance or a drug for which a prescription is required under federal or state law that (is expressly or impliedly represented to be a controlled substance) (is distributed under circumstances that would lead a reasonable person to believe that the substance is a controlled substance) (by overall dosage unit appearance, including shape, color, size, markings, or lack of markings, taste, consistency, or any other identifying characteristic of the substance) would lead a reasonable person to believe the substance is a controlled substance, commits manufacture or distribution of a substance represented to be a controlled substance, a Class C felony.

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. [manufactured]  
[or]  
[financed the manufacture of]  
[or]  
[advertised]  
[or]  
[distributed]  
[or]  
[possessed, with intent to manufacture, finance the manufacture of, advertise, or distribute]
3. a substance that  
[was expressly or impliedly represented to be (name substance), a controlled substance]  
[or]  
[was distributed under circumstances which would have led a reasonable person to believe that the substance was (name substance), a controlled substance]



[or]

[by overall dosage unit appearance, including shape, color, size, markings or lack of markings, taste, consistency, or other identifying physical characteristic of the substance, would have led a reasonable person to believe the substance was (*name substance*), a controlled substance.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of manufacture or distribution of a substance represented to be a controlled substance, a Class C felony.

### Comments

\*The language following this asterisk up to the word “commits” is taken from I.C. 35-48-4-4.5.

The lack of a “valid prescription or order of a practitioner acting in the course of his professional practice” is an exception to, not an element of, the crime, and the Defendant has the burden of proving the exception by a preponderance of the evidence. *Gilbert v. State* 426 N.E.2d 1333 Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982).

The terms “controlled substance,” “distribute,” and “manufacture” are defined by law. See I.C. 35-48-1-9, I.C. 35-48-1-14, and I.C. 35-48-1-18; Instruction Nos. 14.31, 14.67, and 14.129.

Note that it has been held when the substance is represented to be marijuana, hash oil, or hashish, the court may not sentence the Defendant to a term greater than he or she would have received had the represented substance actually been marijuana, hash oil, or hashish. *Conner v. State*, 626 N.E.2d 803 (Ind. 1993). If this limit on the sentence to be imposed applies, the court may wish to delete reference in the instruction to the class of the crime.



**Instruction No. 8.15. Possession of Cocaine or a Narcotic Drug.****I.C. 35-48-4-6.**

The crime of possession of [cocaine], [a narcotic drug] is defined by statute as follows:

A person who knowingly or intentionally possesses [cocaine, pure or adulterated], [a narcotic drug, pure or adulterated, classified in Schedule I or II] commits possession of [cocaine], [a narcotic drug] [methamphetamine], a Class D felony.

(The offense is a Class C felony if [the amount of the drug involved, pure or adulterated, weighs three (3) grams or more] [if the Defendant was also in possession of a firearm, defined as any weapon that is capable of or designed to or that may be readily converted to expel a projectile by means of an explosion].)

(The offense is a Class B felony if the person in possession of the [cocaine] [narcotic drug] possesses less than three grams of pure or adulterated [cocaine] [narcotic drug] [methamphetamine] in or on a school bus or in, on or within one thousand (1,000) feet of [school property], [a public park], [a family housing complex], or [a youth program center].)

(The offense is a Class A felony if the amount of the [cocaine], [narcotic drug], pure or adulterated, involved weighs three (3) grams or more and the person in possession of the [cocaine] [narcotic drug] possesses the [cocaine] [narcotic drug] on a school bus or in, on or within one thousand (1,000) feet of [school property], [a public park], [a family housing complex], or [a youth program center].)

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. knowingly or intentionally;
3. possessed;
4. [cocaine, pure or adulterated];

[or]

[(name drug), pure or adulterated, a narcotic drug, which the Court instructs you is classified by statute as a controlled substance in schedule I or Schedule II];

- (5. *(for Class C felony)* and

[the amount of the drug involved, pure or adulterated,  
weighed three (3) grams or more]

[or]

[when Defendant possessed the drug the Defendant was also  
in possession of a firearm, defined as any weapon that is  
capable of or designed to or that may be readily converted to  
expel a projectile by means of an explosion];

(6. *(for Class B felony)* and the amount of

[cocaine, pure or adulterated]

[or]

[(name drug), pure or adulterated, a narcotic drug, which the  
Court instructs you is classified by statute as a controlled  
substance in schedule I or Schedule II]

which Defendant possessed weighed less than three (3) grams  
and the possession was

[on a school bus]

[or]

[in, on or within one thousand (1,000) feet of

[school property]

[or]

[a public park]

[or]

[a family housing complex]

[or]

[a youth program center];

(7. *(for Class A felony)* and the amount of

[cocaine, pure or adulterated]

[or]

[(name drug), pure or adulterated, a narcotic drug, which the  
Court instructs you is classified by statute as a controlled  
substance in schedule I or Schedule II]

which Defendant possessed weighed three (3) grams or more



and the possession was

[on a school bus]

[or]

[in, on or within one thousand (1,000) feet of

[school property]

[or]

[a public park]

[or]

[a family housing complex]

[or]

[a youth program center].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of possession of [cocaine], [a narcotic drug] [methamphetamine], a Class D/C/B/A felony.

### Comments

The terms "public park," "school bus," "school property," "family housing complex," and "youth program center" are defined by law. *See* I.C. 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-10.5, and I.C. 35-41-1-29; Instruction Nos. 14.166a, 14.181, 14.183, 14.183a, and 14.221.

The Committee notes it has been held that knowledge or intent as to the school, park, family housing, or youth program center proximity enhancement factor is not required. *Walker v. State*, 668 N.E.2d 243 (Ind. 1996).

**Instruction No. 8.15.1. Possession of Methamphetamine.****I.C. 35-48-4-6.**

The crime of possession of methamphetamine is defined by statute as follows:

A person who knowingly or intentionally possesses methamphetamine, pure or adulterated, commits possession of methamphetamine, a Class D felony.

(The offense is a Class C felony [if the amount of the drug involved, pure or adulterated, weighs three (3) grams or more] [if the Defendant was also in possession of a firearm, defined as any weapon that is capable of or designed to or that may be readily converted to expel a projectile by means of an explosion].)

(The offense is a Class B felony if the person in possession of the methamphetamine possesses less than three grams of pure or adulterated methamphetamine in or on a school bus or in, on or within one thousand (1,000) feet of [school property], [a public park], [a family housing complex], or [a youth program center].)

(The offense is a Class A felony if the amount of the methamphetamine, pure or adulterated, involved weighs three (3) grams or more and the person in possession of the methamphetamine possesses the methamphetamine on a school bus or in, on or within one thousand (1,000) feet of [school property] [a public park], [a family housing complex], or [a youth program center].)

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. knowingly or intentionally;
3. possessed;
4. methamphetamine, pure or adulterated;
- (5. and *(for Class C felony)*

[the amount of the drug involved, pure or adulterated, weighed three (3) grams or more]

[or]

[when Defendant possessed the drug the Defendant was also in possession of a firearm, defined as any weapon that is



capable of or designed to or that may be readily converted to expel a projectile by means of an explosion));

- (6. (*for Class B felony*) and the amount of methamphetamine which Defendant possessed weighed less than three (3) grams and the possession was

[on a school bus]

[or]

[in, on or within one thousand (1,000) feet of

[school property]

[or]

[a public park]

[or]

[a family housing complex]

[or]

[a youth program center]);

- (7. (*for Class A felony*) and the amount of methamphetamine which Defendant possessed weighed three (3) grams or more and the possession was

[on a school bus]

[or]

[in, on or within one thousand (1,000) feet of

[school property]

[or]

[a public park]

[or]

[a family housing complex]

[or]

[a youth program center].)

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of possession of [cocaine], [a narcotic drug], a Class D/C/B/A felony.

### Comments

The terms “cocaine,” “controlled substance,” “narcotic drug,” “public park,” “school bus,” “school property,” “family housing complex,” and “youth program center” are defined by law. *See* I.C. 35-48-1-7, I.C. 35-48-1-9, I.C. 35-48-1-20, I.C. 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-10.5, and I.C. 35-41-1-29; Instruction Nos. 14.19, 14.31, 14.139, 14.166a, 14.181, 14.183, 14.183a, and 14.221.

It is not necessary for the jury to determine whether the substance is classified as a controlled substance on a particular schedule. The Court does this, as a matter of law. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).

The Committee notes it has been held that knowledge or intent as to the school, park, family housing, or youth program center proximity enhancement factor is not required. *Walker v. State*, 668 N.E.2d 243 (Ind. 1996).

Having a “valid prescription or order of a practitioner acting in the course of his professional practice” is an exception to, not an element of, the crime, and the Defendant has the burden of proving the exception by a preponderance of the evidence. *Gilbert v. State* 426 N.E.2d 1333 (Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982).



**Instruction No. 8.17. Possession of a Controlled Substance.****I.C. 35-48-4-7(a).**

The crime of possession of a controlled substance is defined by statute as follows:

A person who knowingly or intentionally possesses a controlled substance, pure or adulterated, classified in Schedule I, II, III, or IV, except marijuana or hashish, commits possession of a controlled substance, a Class D felony. (The offense is a Class C felony if it is committed on a school bus or in, on, or within one thousand (1,000) feet of [school property][a public park][a family housing complex][a youth program center].)

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. possessed
4. [name substance], pure or adulterated, which the Court instructs you is classified by statute as a controlled substance in Schedule I, II, III, or IV
5. (for Class C felony) and the possession was
  - [on a school bus]
  - [or]
  - [in, on or within one thousand (1,000) feet of
  - [school property]
  - [or]
  - [a public park]
  - [or]
  - [a family housing complex]
  - [or]
  - [a youth program center]].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of posses-

sion of a controlled substance, a Class D/C felony.

*(Text continued on page 8-27)*





### Comments

The terms “public park,” “school bus,” “school property,” “family housing complex,” and “youth program center” are defined by law. *See* I.C. 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, and I.C. 35-41-1-10.5; Instruction Nos. 14.31, 14.166a, 14.181, 14.183, 14.38a and 14.221.

It is not necessary for the jury to determine whether the substance is classified as a controlled substance on a particular schedule. The Court does this, as a matter of law. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).

The Committee notes it has been held that knowledge or intent as to the school, park, family housing, or youth program center proximity enhancement factor is not required. *Walker v. State*, 668 N.E.2d 243 (Ind. 1996).

Having a “valid prescription or order of a practitioner acting in the course of his professional practice” is an exception to, not an element of, the crime, and the Defendant has the burden of proving the exception by a preponderance of the evidence. *Gilbert v. State* 426 N.E.2d 1333 Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982).



**Instruction No. 8.17a. Possession of a Controlled Substance Analog.**

**I.C. 35-48-4-7(a), I.C. 35-48-4-.05.**

The crime of possession of a controlled substance analog is defined by statute as follows:

A person who knowingly or intentionally possesses a controlled substance analog, pure or adulterated, commits possession of a controlled substance analog, a Class D felony. (The offense is a Class C felony if it is committed on a school bus or in, on, or within one thousand (1,000) feet of [school property] [a public park] [a family housing complex] [a youth program center].)

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. possessed
4. [name], a substance

which was intended, in whole or in part, for human consumption,  
and

which was a controlled substance analog because:

its chemical structure was substantially similar to that of [name], a controlled substance included in schedule I or II and it had

[or]

Defendant (represented it as having) (intended it to have) a [narcotic] [stimulant] [depressant] [hallucinogenic] effect on the central nervous system substantially similar to or greater than the [narcotic] [stimulant] [depressant] [hallucinogenic] effect on the central nervous system of [name], a controlled substance included in schedule I or II

- [5. and the possession was

[on a school bus]

[or]

[in, on or within one thousand (1,000) feet of

[school property]

[or]

[a public park]

[or]

[a family housing complex]

[or]

[a youth program center]]].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of possession of a controlled substance analog, a Class D/C felony.

### Comments

The terms “public park,” “school bus,” “school property,” “family housing complex,” and “youth program center” are defined by law. See I.C. 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, and I.C. 35-41-1-10.5; Instruction Nos. 14.31, 14.166a, 14.181, 14.183, 14.38a and 14.221.

It is not necessary for the jury to determine that the substance to which the analog is similar in chemical structure and effect on the nervous system is classified as a controlled substance on a particular schedule. The Court does this, as a matter of law. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).

The Committee notes it has been held that knowledge or intent as to the school, park, family housing, or youth program center proximity enhancement factor is not required. *Walker v. State*, 668 N.E.2d 243 (Ind. 1996).

Having a “valid prescription or order of a practitioner acting in the course of his professional practice” is an exception to, not an element of, the crime, and the Defendant has the burden of proving the exception by a preponderance of the evidence. *Gilbert v. State* 426 N.E.2d 1333 Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982).

Under I.C. 35-48-1-9.3, the term “controlled substance analog” “does not include”:

- (1) a controlled substance;
- (2) a substance for which there is an approved new drug application;
- (3) a substance for which an exemption is in effect for investigational use by a person under Section 505 of the federal Food, Drug and Cosmetic Act (chapter 675, 52 Stat. 1052 (21 U.S.C. 355)), to the extent that conduct with respect to the substance is permitted under the exemption; or
- (4) a substance to the extent not intended for human consumption before an exemption takes effect regarding the substance.

The Committee believes that this “does not include” list are exceptions to liability which the Defendant must prove by a preponderance. *See Gilbert v. State*, 426 N.E.2d 1333 (Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982). If the Defendant presents evidence of one of these exceptions, a separate instruction should be given on it, advising the jury that the crime “does not



include" manufacturing, financing, delivering, etc. the substance subject to the exception and that the burden is on the Defendant to prove by a preponderance that the exception applies.

(Text continued on page 8-31)

**Instruction No. 8.19. Possession of a Schedule V Codeine Controlled Substance.****I.C. 35-48-4-7(b).**

The crime of possession of a Schedule V controlled substance containing codeine is defined by statute as follows:

A person who knowingly or intentionally obtains [more than four (4) ounces of schedule V controlled substance containing codeine in any given forty-eight (48) hour period unless pursuant to a prescription] [or] [a schedule V controlled substance pursuant to written or verbal representation] [or] [possession of a schedule V controlled substance other than by means of a prescription or by means of signing an exempt narcotic register maintained by a pharmacy licensed by the Indiana State Board of Pharmacy] commits possession of a Schedule V controlled substance containing codeine, a Class D felony.

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. obtained
4. [in a forty-eight (48) hour period, without a prescription, more than four (4) ounces of (*name substance*), which the Court instructs you is a schedule V controlled substance containing codeine,]

[or]

[(*name alleged substance*), which the Court instructs you is a schedule V controlled substance, pursuant to written or verbal misrepresentation]

[or]

[possession of (*name alleged substance*), which the Court instructs you is a schedule V controlled substance, other than by means of a prescription or by means of signing an exempt narcotic register maintained by a pharmacy licensed by the Indiana State Board of Pharmacy].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of possession of a schedule V controlled substance, a Class D felony.



**Comments**

Having a "valid prescription or order of a practitioner acting in the course of his professional practice" is an exception to, not an element of, the crime, and the Defendant has the burden of proving the exception by a preponderance of the evidence. *Gilbert v. State* 426 N.E.2d 1333 Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982).

It is not necessary for the jury to determine whether the substance is classified as a controlled substance on a particular schedule. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of act for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

**Instruction No. 8.20a. Possessing Ammonia or Solution With Intent to Manufacture Methamphetamine.**

**I.C. 35-48-4-14.5(c).**

The crime of possessing chemical reagents or precursors with intent to manufacture methamphetamine is defined by statute as follows:

A person who possesses [anhydrous ammonia] [ammonia solution] with the intent to manufacture methamphetamine or amphetamine, Schedule II controlled substances, commits a Class D felony. (The offense is a Class C felony [if the person possessed a firearm] [if the person possessed the anhydrous ammonia or ammonia solution in, on, or within one thousand (1,000) feet of [school property][a public park][a family housing complex][a youth program center]]).

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. possessed [anhydrous ammonia] [ammonia solution]
3. with the intent to manufacture [methamphetamine] [amphetamine], which the Court instructs you is a Schedule II controlled substance

- (4. *(for C felony)* and

[the Defendant possessed a firearm when he possessed the (anhydrous ammonia) (ammonia solution)]

[or]

[the Defendant possessed the (anhydrous ammonia) (ammonia solution) in, on or within one thousand (1,000) feet of

[school property]

[or]

[a public park]

[or]

[a family housing complex]

[or]

[a youth program center]].)

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of possessing chemical reagents or precursors with intent to manufacture methamphetamine, a Class D/C felony.

**Comment**

The terms “ammonia solution,” “firearm,” “public park,” “school property,” “family housing complex,” and “youth program center” are defined by law. See



I.C. 22-11-20-1; I.C. 35-47-1-5; I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-10.5, and I.C. 35-41-1-29; Instruction Nos. 14.09.6, 14.87; 14.181, 14.183, 14.83a and 14.221.

(Text continued on page 8-35)

**Instruction No. 8.20b. Possessing Reagents or Precursors with  
Intent to Manufacture Controlled Substance.**

**I.C. 35-48-4-14.5(c).**

The crime of possessing chemical reagents or precursors with intent to manufacture a controlled substance is defined by statute as follows:

A person who possesses two or more chemical reagents or precursors with the intent to manufacture a controlled substance commits a Class D felony. (The offense is a Class C felony [if the person possessed a firearm] or [if it is committed in, on, or within one thousand (1,000) feet of [school property], [a public park], [a family housing complex], or [a youth program center]]).

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant;
2. possessed [*name alleged chemical reagent or precursor*], which the Court instructs you is a chemical reagent, and possessed [*name alleged chemical reagent or precursor*], which the Court instructs you is a chemical reagent;
3. with the intent to manufacture [*name alleged controlled substance*];
- (4. (*for Class C felony*) and  
[the Defendant possessed a firearm when he committed the offense]  
  
[or]  
  
[the Defendant committed the offense in, on or within one thousand (1,000) feet of  
  
{school property}  
  
{or}  
  
{a public park}  
  
{or}  
  
{a family housing complex}  
  
{or}  
  
{a youth program center}}]).



If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of possessing chemical reagents or precursors with intent to manufacture a controlled substance, a Class D/C felony.

### Comments

The terms "firearm," "public park," "school property," "family housing complex," and "youth program center" are defined by law. See I.C. 35-47-1-5, I.C. 35-41-1-23.7, I.C. 35-41-1-24.7, and I.C. 35-41-1-10.5; Instruction Nos. 14.87, 14.166a, 14.183, 14.83a, and 14.221.

Insert the names of the specific alleged "chemical reagents or precursors" from the following list in I.C. 35-48-4-14.5(a):

- (1) Ephedrine.
- (2) Pseudoephedrine.
- (3) Phenylpropanolamine.
- (4) The salts, isomers, and salts of isomers of a substance identified in subdivisions (1) through (3).
- (5) Anhydrous ammonia or ammonia solution (as defined in I.C. 22-11-20-1).
- (6) Organic solvents.
- (7) Hydrochloric acid.
- (8) Lithium metal.
- (9) Sodium metal.
- (10) Ether.
- (11) Sulfuric acid.
- (12) Red phosphorous.
- (13) Iodine.
- (14) Sodium hydroxide (lye).
- (15) Potassium dichromate.
- (16) Sodium dichromate.
- (17) Potassium permanganate.
- (18) Chromium trioxide.

- (19) Benzyl cyanide.
- (20) Phenylacetic acid and its esters or salts.
- (21) Piperidine and its salts.
- (22) Methylamine and its salts.
- (23) Isosafrole.
- (24) Safrole.
- (25) Piperonal.
- (26) Hydriodic acid.
- (27) Benzaldehyde.
- (28) Nitroethane.
- (29) Gamma-butyrolactone.
- (30) White phosphorus.
- (31) Hypophosphorous acid and its salts.
- (32) Acetic anhydride.
- (33) Benzyl chloride.
- (34) Ammonium nitrate.
- (35) Ammonium sulfate.
- (36) Hydrogen peroxide.
- (37) Thionyl chloride.
- (38) Ethyl acetate.
- (39) Pseudoephedrine hydrochloride.

It is not necessary for the jury to determine whether the substance is classified as a controlled substance on a particular schedule, or whether the alleged substance is by definition a "chemical reagent or precursor." The Court does this, as a matter of law. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").



**Instruction No. 8.20c. Possessing Ephedrine, Pseudoephedrine or Phenylpropanolamin.****I.C. 35-48-4-14.5(b).**

The crime of possessing [ephedrine] [pseudoephedrine] [phenylpropanolamin] is defined by statute as follows:

A person who possesses more than ten (10) grams of [ephedrine] [pseudoephedrine] [phenylpropanolamin] [the salts, isomers or salts of isomers of (ephedrine) (pseudoephedrine) (phenylpropanolamine)] [a combination of (ephedrine) (pseudoephedrine) (phenylpropanolamin) (the salts, isomers or salts of isomers of {ephedrine} {pseudoephedrine} {phenylpropanolamine})] exceeding ten (10) grams commits a Class D felony. [The offense is a Class C felony if (the person possessed a firearm) (it is committed in, on, or within one thousand (1,000) feet of {school property} {a public park} {a family housing complex} {a youth program center})].

Before you may convict the Defendant, the State must have proved the following beyond a reasonable doubt:

1. The Defendant
2. possessed
3. more than ten (10 grams) of
4. [ephedrine]  
[or]  
[pseudoephedrine]  
[or]  
[phenylpropanolamin]  
[or]  
[the salts, isomers or salts of isomers of  
(ephedrine)  
(or)  
(pseudoephedrine)  
(or)  
(phenylpropanolamine)  
(or)

(a combination of {ephedrine} {pseudoephedrine} {phenylpropanolamin} {(the salts, isomers or salts of isomers of (ephedrine) (pseudoephedrine) (phenylpropanolamine))})

(5. and *(for Class C felony)*

[the Defendant possessed a firearm when he committed the offense]

[or]

[the Defendant committed the offense

[on a school bus]

[or]

[in, on or within one thousand (1,000) feet of

{school property}

{or}

{a public park}

{or}

{a family housing complex}

{or}

{a youth program center})).

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of possessing [ephedrine] [pseudoephedrine] [phenylpropanolamin], a Class D/C felony.

### Comment

The terms “firearm,” “public park,” “school bus,” “school property,” “family housing complex,” and “youth program center” are defined by law. *See* I.C. 35-47-1-5; 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, and I.C. 35-41-1-10.5; Instruction Nos. 14.87; 14.166a, 14.181, 14.183, 14.38a and 14.221.

This offense “does not apply” to the following persons:

(1) a licensed health care provider, pharmacist, retail distributor, wholesaler, manufacturer, warehouseman, or common carrier or an agent of any of these persons if the possession is in the regular course of lawful business activities; or



(2) a person who possesses more than ten (10) grams of a substance described in subsection (b) if the substance is possessed under circumstances consistent with typical medicinal or household use, including:

- (A) the location in which the substance is stored;
- (B) the possession of the substance in a variety of:
  - (i) strengths;
  - (ii) brands; or
  - (iii) types; or
- (C) the possession of the substance:
  - (i) with different expiration dates; or
  - (ii) in forms used for different purposes.

The Committee believes that this “does not include” list are exceptions to liability which the Defendant must prove by a preponderance. *See Gilbert v. State*, 426 N.E.2d 1333 (Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982). If the Defendant presents evidence of one of these exceptions, a separate instruction should be given on it, advising the jury that the crime “does not include” manufacturing, financing, delivering, etc. the substance subject to the exception and that the burden is on the Defendant to prove by a preponderance that the exception applies.

**Instruction No. 8.20d. Unlawful Sale of a Precursor.****I.C. 35-48-4-14.5(g).**

The crime of unlawful sale of a precursor is defined by statute as follows:

A person who [sells], [transfers], [distributes], or [furnishes] a chemical reagent or precursor to another person with knowledge or the intent that the recipient will use the chemical reagent or precursor to manufacture a controlled substance commits unlawful sale of a precursor, a Class D felony. [The offense is a Class C felony if the person sells, transfers, distributes, or furnishes more than ten (10) grams of ephedrine, pseudoephedrine, or phenylpropanolamine.]

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [sold]  
[or]  
[transferred]  
[or]  
[distributed]  
[or]  
[furnished]
3. [(for D felony) (*name alleged reagent or precursor*), which the Court instructs you was established by law to be a chemical reagent or precursor]  
[or]  
[(for C felony) more than ten (10) grams of (ephedrine) (pseudoephedrine) (phenylpropanolamine)]
4. to (*name other person*)
5. with knowledge that (*name other person*) would use the [chemical reagent or precursor] [more than ten (10) grams of (ephedrine) (pseudoephedrine) (phenylpropanolamine)] to manufacture [*name alleged controlled substance*], which the Court instructs you is established by law to be a controlled substance.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of unlawful sale of a precursor, a Class D/C felony charged in Count \_\_\_\_\_.

**Comments**

Insert the names of the specific alleged “chemical reagents or precursors” from the following list in I.C. 35-48-4-14.5(a):



- (1) Ephedrine.
- (2) Pseudoephedrine.
- (3) Phenylpropanolamine.
- (4) The salts, isomers, and salts of isomers of a substance identified in subdivisions (1) through (3).
- (5) Anhydrous ammonia or ammonia solution (as defined in I.C. 22-11-20-1).
- (6) Organic solvents.
- (7) Hydrochloric acid.
- (8) Lithium metal.
- (9) Sodium metal.
- (10) Ether.
- (11) Sulfuric acid.
- (12) Red phosphorous.
- (13) Iodine.
- (14) Sodium hydroxide (lye).
- (15) Potassium dichromate.
- (16) Sodium dichromate.
- (17) Potassium permanganate.
- (18) Chromium trioxide.
- (19) Benzyl cyanide.
- (20) Phenylacetic acid and its esters or salts.
- (21) Piperidine and its salts.
- (22) Methylamine and its salts.
- (23) Isosafrole.
- (24) Safrole.
- (25) Piperonal.
- (26) Hydriodic acid.
- (27) Benzaldehyde.
- (28) Nitroethane.
- (29) Gamma-butyrolactone.
- (30) White phosphorus.
- (31) Hypophosphorous acid and its salts.
- (32) Acetic anhydride.
- (33) Benzyl chloride.

- (34) Ammonium nitrate.
- (35) Ammonium sulfate.
- (36) Hydrogen peroxide.
- (37) Thionyl chloride.
- (38) Ethyl acetate.
- (39) Pseudoephedrine hydrochloride.

It is not necessary for the jury to determine whether the alleged substance is by definition a "chemical reagent or precursor." The Court does this, as a matter of law. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").



**Instruction No. 8.20e. Possession of Precursor by a Methamphetamine Offender.**

**I.C. 35-48-4-14.5.**

The crime of possession of a precursor by a methamphetamine offender is defined by law as follows:

A person who has been convicted of [dealing in methamphetamine] [possession of more than ten (10) grams of (ephedrine) (pseudoephedrine) (phenylpropanolamine)] [possession of (anhydrous ammonia) (ammonia solution) with intent to manufacture methamphetamine or amphetamine] [possession of two (2) or more chemical reagents or precursors with the intent to manufacture a controlled substance] [unlawful sale of a precursor] and who not later than seven (7) years from the date the person was sentenced for the offense knowingly or intentionally possesses (ephedrine) (pseudoephedrine) (phenylpropanolamine), pure or adulterated, commits possession of a precursor by a methamphetamine offender, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. possessed pure or adulterated (ephedrine) (pseudoephedrine) (phenylpropanolamine)
4. not later than seven (7) years from the date the Defendant was sentenced for the offense of

[dealing in methamphetamine]

[or]

[possession of more than ten (10) grams of (ephedrine) (pseudoephedrine) (phenylpropanolamine)]

[or]

[possession of (anhydrous ammonia) (ammonia solution) with intent to manufacture methamphetamine or amphetamine]

[or]

[possession of two (2) or more chemical reagents or precursors with the intent to manufacture a controlled substance] [unlawful sale of a precursor].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of a precursor by a methamphetamine offender, a Class D felony charged in Count \_\_\_\_\_.

**Comments**

The statute provides that it “does not apply” to possession of a drug containing

ephedrine, pseudoephedrine, or phenylpropanolamine that is dispensed under a prescription. The Committee suggests that this language was intended to signify either a defense or, most probably, an "exception." See *Gilbert v. State*, 426 N.E.2d 1333, 1335 (Ind. Ct. App. 1977) (holding that crime of possession of narcotic drug's "without a valid prescription" language created "an exception to and not an element of" the crime and that "it is not necessary for the prosecution to prove the exception"). In any event, whether an exception or a defense, the Committee believes that the burden to prove the "does not apply" provision is on the defendant.

*(Text continued on page 8-43)*



1. The purpose of this document is to provide a comprehensive overview of the current state of the project and to identify the key areas that require attention. The document is organized into several sections, each of which addresses a specific aspect of the project. The first section, "Introduction," provides a brief overview of the project and its objectives. The second section, "Current Status," provides a detailed overview of the current state of the project, including the progress made to date and the challenges that remain. The third section, "Key Areas for Attention," identifies the key areas that require attention and provides a detailed overview of the issues involved. The fourth section, "Recommendations," provides a series of recommendations for addressing the issues identified in the previous section. The fifth section, "Conclusion," provides a brief summary of the document and its findings.

2. The first section, "Introduction," provides a brief overview of the project and its objectives. The project is a multi-phase effort to develop a new system that will improve the efficiency of the organization's operations. The objectives of the project are to reduce the time and cost of the organization's operations, to improve the quality of the organization's products, and to increase the organization's overall productivity. The project is being managed by a team of experienced professionals who are working closely with the organization's management to ensure that the project is completed on time and within budget.

3. The second section, "Current Status," provides a detailed overview of the current state of the project. The project has been underway for several months and has made significant progress to date. The team has completed the initial design phase and has begun development of the system. The team has also conducted a series of tests to evaluate the system's performance and has identified several areas that require attention. The team is currently working to address these areas and to complete the development of the system.

4. The third section, "Key Areas for Attention," identifies the key areas that require attention and provides a detailed overview of the issues involved. The key areas for attention are the system's performance, the system's cost, and the system's quality. The team is currently working to address these areas and to complete the development of the system.

5. The fourth section, "Recommendations," provides a series of recommendations for addressing the issues identified in the previous section. The recommendations are as follows:

- 1. The team should continue to work on improving the system's performance.
- 2. The team should continue to work on reducing the system's cost.
- 3. The team should continue to work on improving the system's quality.

6. The fifth section, "Conclusion," provides a brief summary of the document and its findings. The document provides a comprehensive overview of the current state of the project and identifies the key areas that require attention. The team is currently working to address these areas and to complete the development of the system.

**Instruction No. 8.23. Manufacture of Paraphernalia.****I.C. 35-48-4-8.1.**

The infraction of manufacture of paraphernalia is defined by statute as follows:

A person who knowingly or intentionally\* [manufactures] [finances the manufacture of] [designs an instrument, device, or other object that is intended to be used primarily for introducing into the human body a controlled substance, testing the strength, effectiveness, or purity of a controlled substance, or enhancing the effect of a controlled substance] in violation of Indiana Code Chapter 35-48-4, commits a Class A infraction for manufacturing paraphernalia.

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
  1. knowingly or intentionally
  2. [manufactured]
 

[or]

[financed the manufacture of]

[or]

[designed]
  3. an instrument, device or other object which the Defendant intended to be used primarily for
 

[introducing into the human body]

[or]

[testing the strength, effectiveness, or purity of]

[or]

[enhancing the effect of]

[name substance], which the Court instructs you is a controlled substance,
  4. in violation of Indiana Code Chapter 35-48-4-[insert section number], which prohibits[here describe elements of 35-48-4 offense Defendant intended object to be used in violation of].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of manufacturing paraphernalia, a Class A infraction.



### Comments

A trial of manufacture of paraphernalia as a Class D felony must be bifurcated. See Chapter 15, Instruction 15.51.

\*This instruction is intended for use in trials of manufacture of paraphernalia as a Class D felony. Thus "knowingly or intentionally" as an element is required by I.C. 35-48-4-8.1(b). The Committee believes the State must prove commission of the second, predicate infraction beyond a reasonable doubt for D felony liability.

The term "manufacture" is defined by law. See I.C. 35-48-1-18; Instruction No. 14.129.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

**Instruction No. 8.25. Dealing in Paraphernalia.****I.C. 35-48-4-8.5(a).**

The infraction of dealing in paraphernalia is defined by statute as follows:

A person who knowingly or intentionally\* keeps for sale, offers for sale, delivers or finances the delivery of a raw material, an instrument, a device, or other object that is intended to be or that is designed or marketed to be used primarily for [ingesting, inhaling, or otherwise introducing into the human body (marijuana) (hash oil) (hashish) (salvia) (a synthetic drug) (a controlled substance)] [testing the strength, effectiveness, or purity of (marijuana) (hash oil) (hashish) (salvia) (a synthetic drug) (a controlled substance)] [enhancing the effect of a controlled substance) (manufacturing, compounding, converting, producing, processing, or preparing (marijuana) (hash oil) (hashish) (salvia) (a synthetic drug) (a controlled substance)] [diluting or adulterating (marijuana) (hash oil) (hashish) (salvia) (a synthetic drug) (a controlled substance) by individuals] [any purpose announced or described by the seller that is in violation of this chapter (I.C. 35-48-4-8.5)] commits a Class A infraction for dealing in paraphernalia.

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally\*
3. [kept for sale]

[or]

[offered for sale]

[or]

[delivered]

[or]

[financed the delivery of]

4. [a raw material]

[or]

[an instrument]

[or]

[a device]

[or]

[an object]

that was

[intended]



[or]

[designed]

[or]

[marketed]

to be used primarily for

[ingesting, inhaling, or otherwise introducing into the human body

(marijuana)

(or)

(hash oil)

(or)

(hashish)

(or)

(salvia)

(or)

([*name substance*] which the Court instructs you is a synthetic drug)

(or)

([*name substance*], which the Court instructs you is a controlled substance)]

[or]

[testing the strength, effectiveness, or purity of (marijuana)

(or)

(hash oil)

(or)

(hashish)

(or)

(salvia)

(or)

([*name substance*] which the Court instructs you is a synthetic drug)

(or)

([*name substance*], which the Court instructs you is a controlled substance)]

[or]

[enhancing the effect of (*name substance*), which the Court instructs you is a

controlled substance]

[or]

[(manufacturing)

(or)

(compounding)

(or)

(converting)

(or)

(producing)

(or)

(processing)

(or)

(preparing)

(marijuana)

(or)

(hash oil)

(or)

(hashish)

(or)

(salvia)

(or)

[*name substance*] which the Court instructs you is a synthetic drug)

(or)

[*name substance*], which the Court instructs you is a controlled substance)]

[or]

[testing the strength, effectiveness, or purity of (marijuana)

(or)

(hash oil)

(or)

(hashish)

(or)



(salvia)

(or)

([*name substance*] which the Court instructs you is a synthetic drug)

(or)

([*name substance*], which the Court instructs you is a controlled substance)]

(or)

[the purpose, announced or described by (*name*), the seller, of (*here describe elements of I.C. 35-48-4-8.5 offense*)].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of dealing in paraphernalia, a Class A infraction.

### Comments

A trial of dealing in paraphernalia as a Class D felony must be bifurcated. See Chapter 15, Instruction 15.53.

\*This instruction is intended for use in trials of dealing in paraphernalia as a Class D felony. This “knowingly or intentionally” as an element is required by I.C. 35-48-4-8.5(b). The Committee believes the State must prove commission of the offense beyond a reasonable doubt.

The terms “delivery,” “manufacture,” “marijuana,” “salvia” and “synthetic drug” are defined by law. See I.C. 35-48-1-19, I.C. 35-41-1-24.2 and I.C. 35-41-1-26.3; Instruction Nos. 14.51, 14.129, 14.131, 14.178.5 and 14.201.7.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance or a synthetic drug. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).

**Instruction No. 8.27. Reckless Dealing in Paraphernalia.****I.C. 35-48-4-8.5(c).**

The crime of reckless dealing in paraphernalia is defined by statute as follows:

A person who recklessly keeps for sale, offers for sale, or delivers an instrument, a device, or other object that is to be used primarily for [ingesting, inhaling, or otherwise introducing into the human body (marijuana) (hash oil) (hashish) (salvia) (a synthetic drug) (a controlled substance)] [testing the strength, effectiveness, or purity of (marijuana) (hash oil) (hashish) (salvia) (a synthetic drug) (a controlled substance)] [enhancing the effect of a controlled substance) (manufacturing, compounding, converting, producing, processing, or preparing (marijuana) (hash oil) (hashish) (salvia) (a synthetic drug) (a controlled substance)] [diluting or adulterating (marijuana) (hash oil) (hashish) (salvia) (a synthetic drug) (a controlled substance) by individuals] [any purpose announced or described by the seller that drug is in violation of this chapter (I.C. 35-48-4-8.5)] commits reckless dealing in paraphernalia, a Class A misdemeanor.

To convict the Defendant, the State must have proved each of the following:

1. The Defendant

2. recklessly

3. [kept for sale]

[or]

[offered for sale]

[or]

[delivered]

4. [an instrument]

[or]

[a device]

[or]

[an object]

that was to be used primarily for

[ingesting, inhaling, or otherwise introducing into the human body

(marijuana)

(or)

(hash oil)

(or)

(hashish)



(or)  
(salvia)  
(or)  
[*name substance*] which the Court instructs you is a synthetic drug)  
(or)  
[*name substance*], which the Court instructs you is a controlled substance)]  
[or]  
[testing the strength, effectiveness, or purity of  
(marijuana)  
(or)  
(hash oil)  
(or)  
(hashish)  
(or)  
(salvia)  
(or)  
[*name substance*] which the Court instructs you is a synthetic drug)  
(or)  
[*name substance*], which the Court instructs you is a controlled substance)]  
[or]  
[enhancing the effect of (*name substance*), which the Court instructs you is a  
controlled substance]  
[or]  
[(manufacturing)  
(or)  
(compounding)  
(or)  
(converting)  
(or)  
(producing)  
(or)

(processing)

(or)

(preparing)

(marijuana)

(or)

(hash oil)

(or)

(hashish)

(or)

(salvia)

(or)

(*[name substance]*) which the Court instructs you is a synthetic drug

(or)

(*[name substance]*), which the Court instructs you is a controlled substance)]

[or]

[the purpose, announced or described by (*name*), the seller, of (*here describe elements of I.C. 35-48-4-8.5 offense*).]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of reckless dealing in paraphernalia, a Class A misdemeanor.

### Comments

A trial of reckless dealing in paraphernalia as a Class D felony must be bifurcated. *See* Chapter 15, Instruction 15.55.

The terms “delivery,” “manufacture,” “marijuana,” “salvia” and “synthetic drug” are defined by law. *See* I.C. 35-48-1-19, I.C. 35-41-1-24.2 and I.C. 35-41-1-26.3; Instruction Nos. 14.51, 14.129, 14.131, 14.178.5 and 14.201.7.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance or a synthetic drug. The Court does this, as a matter of law. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).



**Instruction No. 8.29. Possession of Paraphernalia.****I.C. 35-48-4-8.3(a).**

The crime of possession of paraphernalia is defined by statute as follows:

A person who knowingly or intentionally\* possesses a [raw material] [instrument] [device] [other object] that the person intends to use for [introducing into the person's body a controlled substance] [testing the strength, effectiveness, or purity of a controlled substance] [enhancing the effect of a controlled substance] in violation of this chapter [I.C. 35-48-4] commits possession of paraphernalia, a Class A misdemeanor.

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally\*
3. possessed [a raw material] [instrument] [device] [object]
4. that the Defendant intended to use for  
[introducing into the Defendant's body]  
[or]  
[testing the strength, effectiveness, or purity of]  
[or]  
[enhancing the effect of]  
[*name substance*], which the Court instructs you is a  
a controlled substance
5. in violation of I.C. 35-48-4-[*insert appropriate section number*], which prohibits [*set out elements of the I.C. 35-48-4 offense*].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of possession of paraphernalia, a Class A misdemeanor.

**Comments**

A trial of possession of paraphernalia as a Class D felony must be bifurcated. See Chapter 15, Instruction 15.57.

\*This instruction is intended for use in trials of possession of paraphernalia as a Class D felony. Thus, "knowingly or intentionally" as an element is required by I.C. 35-48-4-8.3(b). The Committee believes the State must prove commission of the offense beyond a reasonable doubt.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled

substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").



**Instruction No. 8.31. Reckless Possession of Paraphernalia.****I.C. 35-48-4-8.3(c).**

The crime of reckless possession of paraphernalia is defined by statute as follows:

A person who recklessly possesses a [raw material] [instrument] [device] [other object] that the person intends to use for [introducing into the person's body a controlled substance] [testing the strength, effectiveness, or purity of a controlled substance] [enhancing the effect of a controlled substance] in violation of this chapter [I.C. 35-48-4] commits reckless possession of paraphernalia, a Class A misdemeanor.

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally\*
3. recklessly possessed [a raw material] [instrument] [device] [object]
4. that the Defendant intended to use for  
[introducing into the Defendant's body]  
[or]  
[testing the strength, effectiveness, or purity of]  
[or]  
[enhancing the effect of]  
[name substance], which the Court instructs you is a controlled substance
5. in violation of I.C. 35-48-4-[insert appropriate section number], which prohibits [set out elements of the I.C. 35-48-4 offense].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of reckless possession of paraphernalia, a Class A infraction.

**Comments**

A trial of reckless possession of paraphernalia as a Class D felony must be bifurcated. *See* Chapter 15, Instruction 15.59.

\*This instruction is intended for use in trials of possession of paraphernalia as a Class D felony. Thus, "knowingly or intentionally" as an element is required by I.C. 35-48-4-8.3(b). The Committee believes the State must prove commission of the offense beyond a reasonable doubt.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance. The Court does this, as a matter of law. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

**Instruction No. 8.33. Dealing in Marijuana, Hash Oil, Hashish, or Salvia.****I.C. 35-48-4-10.**

The crime of dealing in (marijuana) (hash oil) (hashish) (salvia) is defined by statute as follows:

A person who knowingly or intentionally ([manufactures] [finances the manufacture of] [delivers] [finances the delivery of] [marijuana] [hash oil] [hashish] [salvia], pure or adulterated) (possesses, with intent to [manufacture] [finance the manufacture of] [deliver] [finance the delivery of] [marijuana] [hash oil] [hashish] [salvia], pure or adulterated) commits dealing in [marijuana] [hash oil] [hashish] [salvia], a Class A misdemeanor. [The offense is a Class D felony if (the recipient or intended recipient is under eighteen (18) years of age) (the amount involved is [more than thirty (30) grams but less than ten (10) pounds of marijuana] [two (2) grams but less than three hundred (300) grams of (hash oil or hashish) (salvia)]).] [The offense is a Class C felony if (the amount involved is ten (10) pounds or more of marijuana) (three hundred (300) or more grams of hash oil or hashish salvia) (the person delivered or financed the delivery of [marijuana] [hash oil] [hashish] [salvia] on a school bus or in, on, or within one thousand (1,000) feet of school property or a public park or a family housing complex or a youth program center).]

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. [manufactured]  
[or]  
[financed the manufacture of]  
[or]  
[delivered]  
[or]  
[financed the delivery of]  
[or]  
[possessed, with intent to (manufacture) (finance the manufacture of) (deliver) (finance the delivery of)]
4. pure or adulterated  
[marijuana]  
[or]  
[hash oil]  
[or]



[hashish]

[or]

[salvia]

[5. and (*for Class D felony*)

[the recipient or intended recipient was under eighteen (18) years of age]

[or]

[the amount involved was

(more than thirty (30) grams but less than ten (10) pounds of marijuana)

(or)

(two (2) or more grams but less than three hundred (300) grams of [hash oil  
or hashish] [salvia] [( )])

6. and (*for Class C felony*)

the amount involved was

(ten (10) pounds or more of marijuana)

(or)

(three hundred (300) or more grams of [hash oil or hashish] [salvia])

or

the Defendant delivered or financed the delivery of

[marijuana]

(or)

[hash oil]

(or)

[hashish]

(or)

(salvia)

(on a school bus)

(or)

(within one thousand [1,000] feet of

[school property]

[or]

[a public park]

[or]

[a family housing complex]

[or]

[a youth program center]]).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of dealing in \_\_\_\_\_ [marijuana] [hash oil] [hashish] [salvia] a Class A misdemeanor/Class D/C felony.

### Comments

A trial of dealing in marijuana, hash oil, hashish, or salvia as a Class D felony based on a prior conviction must be bifurcated. *See* Chapter 15, Instruction 15.45.

The terms “delivery,” “manufacture,” “marijuana,” “public park,” “salvia,” “school bus,” “school property”, “family housing complex,” and “youth program center” are defined by law. *See* I.C. 35-48-1-11, I.C. 35-48-1-18, I.C. 35-48-1-19, I.C. 35-41-1-23.7, I.C. 35-41-1-24.2, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-10.5 and 35-41-1-29; Instruction Nos. 14.51, 14.129, 14.131, 14.166a, 14.178.5, 14.181, 14.183, 14.83a and 14.221.



**Instruction No. 8.33.2. Dealing in a Synthetic Drug or Synthetic Drug  
Lookalike Substance (Infraction).**

**I.C. 35-48-4-10.5.**

The infraction of dealing in a synthetic drug or synthetic drug lookalike substance is defined by statute as follows:

A person who [manufactures] [finances the manufacture of] [delivers] [finances the delivery of] [possesses, with intent to (manufacture) (finance the manufacture of) (deliver) (finance the delivery of)] [a synthetic drug] [a synthetic drug lookalike substance] commits dealing in [a synthetic drug] [a synthetic drug lookalike substance], a Class A infraction.

To return a verdict against the Defendant, the State must have proved each of the following by the greater weight of the evidence:

1. The Defendant

2. [manufactured]

[or]

[financed the manufacture of]

[or]

[delivered]

[or]

[financed the delivery of]

[or]

[possessed, with intent to (deliver) (finance the delivery of)]

3. [(name drug), a synthetic drug] [a synthetic drug lookalike substance].

If the State failed to prove each of these elements by the greater weight of the evidence, you must not return a verdict against the Defendant of dealing in [a synthetic drug] [a synthetic drug lookalike substance] a Class A infraction as charged in Count \_\_\_\_\_.

**Comments**

A trial of dealing a synthetic drug or a synthetic drug lookalike substance as a Class D felony based on a prior infraction judgment of the same offense must be bifurcated. See Chapter 15, Instruction No. 15.45.5.

The terms “delivery,” “manufacture,” “public park,” “school bus,” “school property,” “synthetic drug,” and “synthetic drug lookalike substance” are defined by law. See I.C. 35-48-1-11, I.C. 35-48-1-18, I.C. 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-26.3, and I.C. 35-31.5-2-321.5; Instruction Nos. 14.51, 14.129, 14.166a, 14.181, 14.183, 14.201.7, and 14.201.9.

It is not necessary for the jury to determine whether a substance is classified as a

synthetic drug. The Court does this, as a matter of law. *See Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).

The court should instruct separately on the greater weight of the evidence by using Model Civil Jury Instruction No. 111:

Evidence is of the greater weight if it convinces you more strongly of its truthfulness.

It is evidence that convinces you that something is more probably true than not true.

A greater number of witnesses testifying to a fact on one side or a greater quantity of evidence introduced on one side does not necessarily amount to the greater weight of the evidence.

If this dealing in a synthetic drug or lookalike substance is being tried with criminal charges, the Committee suggests adding to Preliminary Instructions 1.13 and 1.15 an initial note “With respect to Count(s) \_\_\_\_\_,” [the felony and/or misdemeanor counts] to help the jury understand beyond a reasonable doubt applies to those counts but not to the infraction.



**Instruction No. 8.33.3. Dealing in a Synthetic Drug or Synthetic Drug  
Lookalike Substance (Crime).**

**I.C. 35-48-4-10.5.**

The crime of dealing in a synthetic drug or synthetic drug lookalike substance is defined by statute as follows:

A person who knowingly or intentionally [manufactures] [finances the manufacture of] [delivers] [finances the delivery of] [possesses, with intent to (manufacture) (finance the manufacture of) (deliver) (finance the delivery of)] [a synthetic drug] [a synthetic drug lookalike substance] commits dealing in [a synthetic drug] [a synthetic drug lookalike substance], a Class A misdemeanor. [The offense is a Class D felony if (the recipient or intended recipient is under eighteen (18) years of age) (the amount involved is more than two (2) grams).] [The offense is a Class C felony if the amount involved is more than two (2) grams and the person delivered or financed the delivery of [the synthetic drug] [the synthetic drug lookalike substance] [on a school bus] [in, on, or within five hundred (500) feet of school property or a public park] while a person under (18) years of age was reasonably expected to be present.]

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [manufactured]  
[or]  
[financed the manufacture of]  
[or]  
[delivered]  
[or]  
[financed the delivery of]  
[or]  
[possessed, with intent to (manufacture) (finance the manufacture of) (deliver) (finance the delivery of)]
4. [(*name drug*), a synthetic drug] [a synthetic drug lookalike substance]
5. and (for *Class D felony*)  
[the recipient or intended recipient was under eighteen (18) years of age]  
[or]  
[the amount of [the synthetic drug] [the synthetic drug lookalike substance] involved was more than two (2) grams]]

[6. and (for *Class C felony*) the amount of [the synthetic drug] [the synthetic drug lookalike

substance] involved was more than two (2) grams

and

the Defendant [delivered] [financed the delivery of] [the synthetic drug] [the synthetic drug lookalike substance]

[on a school bus] [

or]

[in, on, or within five hundred (500) feet of school property or a public park]

while a person under (18) years of age was reasonably expected to be present.]

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of dealing in [a synthetic drug] [a synthetic drug lookalike substance] a Class A misdemeanor/Class D/C felony, as charged in Count

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### Comments

A trial of dealing a synthetic drug or a synthetic drug lookalike substance as a Class D felony based on a prior conviction must be bifurcated. See Chapter 15, Instruction No. 15.45.5.

The terms “delivery,” “manufacture,” “public park,” “school bus,” “school property,” “synthetic drug,” and “synthetic drug lookalike substance” are defined by law. See I.C. 35-48-1-11, I.C. 35-48-1-18, I.C. 35-41-1-23.7, I.C. 35-41-1-24.3, I.C. 35-41-1-24.7, I.C. 35-41-1-26.3, and I.C. 35-31.5-2-321.5; Instruction Nos. 14.51, 14.129, 14.166a, 14.181, 14.183, 14.201.7, and 14.201.9.

It is not necessary for the jury to determine whether a substance is classified as a synthetic drug. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a “controlled substance” not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a “controlled substance”).



**Instruction No. 8.35. Possession of Marijuana, Hash Oil, Hashish, or Salvia.****I.C. 35-48-4-11.**

The crime of possession of (marijuana) (hash oil) (hashish) (salvia) is defined by statute as follows:

A person who [knowingly or intentionally possesses (pure or adulterated) (marijuana) (hash oil) (hashish) (salvia)] [knowingly or intentionally grows or cultivates marijuana] [knowing that marijuana is growing on his/her premises, fails to destroy the marijuana plants] commits possession of (marijuana) (hash oil) (hashish) (salvia), a Class A misdemeanor. [The offense is a Class D felony if the amount involved is more than (thirty [30] grams of marijuana) (two [2] grams of hash oil or hashish).]

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. [possessed pure or adulterated (marijuana) (hash oil) (hashish) (salvia)]  
[or]  
[grew or cultivated marijuana]  
[or]  
[with knowledge that marijuana was growing on his/her premises failed to destroy the marijuana plants]
4. (for Class D felony) and the amount of (marijuana) (hash oil) (hashish) (salvia) involved was more than (thirty [30] grams of marijuana) (two [2] grams of (hash oil or hashish) (salvia)).

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of possession of marijuana, hash oil or hashish, a Class A misdemeanor/Class D felony.

**Comments**

A trial of possession of marijuana, hash oil, hashish, or salvia as a Class D felony based on a prior conviction must be bifurcated. See Chapter 15, Instruction No. 15.45.

The term "salvia" is defined by law. See;

(Text continued on page 8-61)

**Instruction No. 8.35a. Exposure of a Minor  
or Endangered Adult  
to Drugs or Controlled Substances.**

**I.C. 35-48-4-13.3.**

The crime of exposure of a minor or endangered adult to drugs or controlled substances is defined by statute as follows:

A person who recklessly, knowingly, or intentionally takes [a person less than eighteen (18) years of age] [an endangered adult (as defined in IC 12-10-3-2 )] into a [building] [structure] [vehicle] [other place] that is being used by any person to [unlawfully possess drugs or controlled substances] [unlawfully (manufacture) (keep) (offer for sale) (sell) (deliver) (finance the delivery of) drugs or controlled substances)] commits exposure of a minor or endangered adult to drugs or controlled substances, a Class A misdemeanor.

Before you may convict the Defendant, the State must have proved the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. took (*name alleged minor or endangered adult*), when (*name alleged minor or endangered adult*) was  
[less than eighteen (18) years of age]  
[or]  
[an endangered adult]
4. to (*describe alleged place*), a [building] [structure] [vehicle] [other place]
5. when (*describe alleged place*) was being used by a person to  
[unlawfully possess (*name alleged drug or controlled substance*), a (drug) (controlled substance)]  
[or]  
[unlawfully  
(manufacture)  
(or)  
(keep)  
(or)  
(offer for sale)  
(or)  
(sell)  
(or)  
(deliver)]



(or)

(finance the delivery of)

(name alleged drug or controlled substance), a (drug) (controlled substance)].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of exposure of a minor or endangered adult to drugs or controlled substances, a class A misdemeanor.

**Comments**

The terms "controlled substance," "drug," and "endangered adult" are defined by law. See I.C. 35-48-1-9, 35-48-1-16, and 35-48-1-1, 4-28-5-2; Instruction Nos. 14.31, 14.71, and 14.77.

Trial of the offense as a Class D felony for having a prior conviction of the offense must be bifurcated. See Chapter 15, Instruction No. 15.81.



**Instruction No. 8.37. Maintaining a Common Nuisance****I.C. 35-48-4-13(b).**

The crime of maintaining a common nuisance is defined by statute as follows:

A person who knowingly or intentionally maintains a building, structure, vehicle, or other place that is used one [1] or more times by persons (to unlawfully use controlled substances) (for unlawfully manufacturing, keeping, offering for sale, selling, delivering, or financing the delivery of [controlled substances] [items of drug paraphernalia as described in I.C. 35-48-4-8.2]), commits maintaining a common nuisance, a Class D felony.

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. maintained a [building] [structure] [vehicle] [other place]
4. that was used one or more times

[by persons to unlawfully use (*name substances*), which the Court instructs you are controlled substances]

[or]

[for unlawfully

(manufacturing)

(or)

(keeping)

(or)

(offering for sale)

(or)

(selling)

(or)

(delivering)

(or)

(financing the delivery of)

[(*name substances*), which the Court instructs you are controlled substances]

(or)

(items of drug paraphernalia, defined in I.C. 35-48-4-8.2) as

{raw materials} {instruments} {devices} {objects} intended to be used for

[introducing into the human body]

[or]

[testing the strength, effectiveness, or purity of]

[or]

[enhancing the effect of]

[name substance], which the Court instructs you is a controlled substance in violation of I.C. 35-48-4-[insert appropriate section number], which prohibits [set out elements of the I.C. 35-48-4 offense]].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of maintaining a common nuisance, a Class D felony.



**Comments**

It is not necessary for the jury to determine whether a substance is classified as a controlled substance. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

**Instruction No. 8.39. Distribution in Violation of I.C. 35-48-3.****I.C. 35-48-4-14(a)(1).**

The crime of distribution in violation of I.C. 35-48-3 is defined by statute as follows:

A person who is subject to I.C. 35-48-3 and who recklessly, knowingly, or intentionally distributes or dispenses a controlled substance in violation of I.C. 35-48-3 commits a Class D felony.

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. was subject to I.C. 35-48-3 in that [here specify the alleged basis for Defendant's being subject to I.C. 35-48-3]
3. and when subject to I.C. 35-48-3
4. recklessly, knowingly or intentionally
5. [distributed] [dispensed]
6. [name substance], which the Court instructs you is a controlled substance
7. in violation of I.C. 35-48-3 [here specify the alleged violation].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of distribution in violation of I.C. 35-48-3, a Class D felony.



**Comments**

The terms "controlled substance," "dispense" and "distribute" are defined by law. See I.C. 35-48-1-9, I.C. 35-48-1-12 and I.C. 35-48-1-14; Instruction Nos. 14.31, 14.61 and 14.67.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

**Instruction No. 8.41. Manufacture or Distribution Unauthorized by Registration.****I.C. 35-48-4-14(a)(2).**

The crime of manufacture or distribution unauthorized by registration is defined by statute as follows:

A person who is a registrant and who recklessly, knowingly, or intentionally [manufactures] [finances the manufacture of] [distributes] [dispenses] a controlled substance not authorized by his registration to another registrant or other authorized person commits a Class D felony.

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. when a registrant [*here specify allegations as to registrant status*]
3. [recklessly] [knowingly] [intentionally]
4. [manufactured]  
[or]  
[financed the manufacture of]  
[or]  
[distributed]  
[or]  
[dispensed]
5. [*name substance*], which the Court instructs you is a controlled substance
7. when [*name substance*] was not authorized by Defendant's registration
6. to [*name individual*], another registrant or other authorized person.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of manufacture or distribution unauthorized by registration, a Class D felony.



**Comments**

The terms "controlled substance," "dispense," "distribute," and "manufacture" are defined by law. See I.C. 35-48-1-9, I.C. 35-48-1-12, I.C. 35-48-1-14 and I.C. 35-48-1-18; Instruction Nos. 14.31, 14.61, 14.67 and 14.129.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

**Instruction No. 8.43. Failure to Document.****I.C. 35-48-4-14(a)(3).**

The crime of failure to document is defined by statute as follows:

A person who [recklessly] [knowingly] [intentionally] fails to [make] [keep] [furnish] (a record) (a notification) (an order form) (a statement) (an invoice) (information required under I.C. 35-48) commits a Class D felony.

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. failed to
  - [make]
  - [or]
  - [keep]
  - [or]
  - [furnish]
3. [a record]
  - [or]
  - [a notification]
  - [or]
  - [an order form]
  - [or]
  - [a statement]
  - [or]
  - [an invoice]
  - [or]
  - [information]
4. in violation of the requirement that [*specify statutory record requirement allegedly violated*].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of failure to document, a Class D felony.



**Instruction No. 8.45. Refusal of Inspection.****I.C. 35-48-4-14(a)(4).**

The crime of refusal of inspection is defined by statute as follows:

A person who [recklessly] [knowingly] [intentionally] refuses entry into any premises for an inspection authorized by I.C. 35-48 commits a Class D felony.

To convict the Defendant, the State must have proved each of the following elements:

1. The Defendant
2. [recklessly] [knowingly] [intentionally]
3. refused entry into [*describe premises alleged*]
4. for an inspection authorized by [*here specify statutory source and nature of inspection authorized*].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of refusal of inspection, a Class D felony.

**Instruction No. 8.47. Distribution Without an Order Form.****I.C. 35-48-4-14(b)(1).**

The crime of distribution without an order form is defined by statute as follows:

A person who [knowingly] [intentionally] distributes as a registrant a controlled substance classified in Schedule I or II, except under an order form as required by I.C. 35-48-3, commits a Class D felony.

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. distributed as a registrant [*here describe basis for registrant status*]
4. [*name substance*], which the Court instructs you is a controlled substance classified in Schedule I or II
5. without an order form as required by [*here set out statutory source for order form requirement*].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of distribution without an order form, a Class D felony.



**Comments**

The terms "controlled substance" and "distribute" are defined by law. See I.C. 35-48-1-9 and I.C. 35-48-1-14; Instruction Nos. 14.31 and 14.67.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

**Instruction No. 8.49. Use of Fictitious Registration Number.****I.C. 35-48-4-14(b)(2).**

The crime of use of a fictitious registration number is defined by statute as follows:

A person who knowingly or intentionally uses in the course of the [manufacture] [financing] [manufacture] [distribution] of a controlled substance a federal or state registration number that is [fictitious] [revoked] [suspended] [issued to another person] commits a Class D felony.

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. in the course of the  
[manufacture]  
[or]  
[financing]  
[or]  
[manufacture]  
[or]  
[distribution]
4. of [name substance], which the Court instructs you is a controlled substance
5. used a federal or state registration number that was  
[fictitious]  
[or]  
[revoked]  
[or]  
[suspended]  
[or]  
[issued to another person].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of use of a fictitious registration number, a Class D felony.



**Comments**

The terms "controlled substance" and "distribute" are defined by law. See I.C. 35-48-1-9 and I.C. 35-48-1-14; Instruction Nos. 14.31 and 14.67.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

**Instruction No. 8.51. False Documentation.****I.C. 35-48-4-14(b)(3).**

The crime of false documentation is defined by statute as follows:

A person who [knowingly] [intentionally] [furnishes false or fraudulent material information in] [omits any material information from] an [application] [report] [document] required to be kept or filed under I.C. 35-48 commits a Class D felony.

To convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. [knowingly] [intentionally]
3. [furnished false or fraudulent material information in]  
[or]  
[omitted material information from]
4. [name document], which was  
[an application]  
[a report]  
[a document]

required to be kept or filed [*here set out statutory requirement for the application, report, or document and facts alleged*].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of false documentation, a Class D felony.



**Instruction No. 8.53. Counterfeit Trademarking.****I.C. 35-48-4-14(b)(4).**

The crime of counterfeit trademarking is defined by statute as follows:

A person who knowingly or intentionally [makes] [distributes] [possesses] a punch, die, plate, stone, or other thing designed to print, imprint or reproduce the trademark, trade name or other identifying mark, imprint, or device of another or a likeness of any of the foregoing on a drug or container or labeling thereof so as to render the drug a counterfeit substance, commits a Class D felony.

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. [made]  
[or]  
[distributed]  
[or]  
[possessed]
4. a [punch] [die] [plate] [stone] [thing] designed to print, imprint, or reproduce
5. [the trademark]  
[or]  
[a likeness of the trademark]  
[or]  
[the trade name]  
[or]  
[a likeness of the trade name]  
[or]  
[identifying mark, imprint or device]  
[or]  
[a likeness of the identifying (mark) (imprint) or (device)]
6. of (name owner)
7. on (a drug) (a container) (the labeling of a drug) (the labeling of a container] so as to render the drug a counterfeit substance.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of counterfeit trademarking, a Class D felony.

**Comments**

The terms "counterfeit substance" and "drug" are defined by law. See I.C. 35-48-1-10 and I.C. 35-48-1-16; Instruction Nos. 14.33 and 14.71.



**Instruction No. 8.55. Possession of a Controlled Substance by Misrepresentation.**

**I.C. 35-48-4-14(c).**

The crime of possession of a controlled substance by misrepresentation is defined by statute as follows:

A person who knowingly or intentionally acquires possession of a controlled substance by [misrepresentation] [fraud] [forgery] [deception] [subterfuge] [alteration of a prescription order] [concealment of a material fact] [use of a false name or false address] commits possession of a controlled substance by misrepresentation, a Class D felony.

To convict the Defendant, the State must have proved each of the following:

**The Defendant**

1. knowingly or intentionally
2. acquired possession of [name substance], a controlled substance
3. [by misrepresentation]

[or]

[by fraud]

[or]

[by forgery]

[or]

[by deception]

[or]

[by subterfuge]

[or]

[by alteration of a prescription order]

[or]

[by concealment of a material fact]

[or]

[by use of a false name or a false address].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of possession of a controlled substance by misrepresentation, a Class D felony.

**Comments**

A trial of possession of a controlled substance by misrepresentation as a Class C felony must be bifurcated. See Chapter 15, Instruction 15.61.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").



**Instruction No. 8.57. False Labeling of a Controlled Substance.****I.C. 35-48-4-14(d).**

The crime of false labeling of a controlled substance is defined by statute as follows:

A person who knowingly or intentionally affixes any false or forged label to a package or receptacle containing a controlled substance commits a Class D felony.

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. knowingly or intentionally
3. affixed a false or forged label
3. to a package or receptacle containing [*name substance*], a controlled substance.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of false labeling of a controlled substance, a Class D felony.

**Comments**

A trial of false labeling as a Class C felony must be bifurcated. See Chapter 15, Instruction 15.63.

It is not necessary for the jury to determine whether a substance is classified as a controlled substance. The Court does this, as a matter of law. See *Russell v. State*, 182 Ind. App. 386, 395 N.E.2d 791 (1979) (whether marijuana a "controlled substance" not a question of fact for the jury; trial judge properly took judicial notice of statutes and instructed the jury marijuana is a "controlled substance").

The statute includes the following exemption: "This subsection does not apply to law enforcement agencies or their representatives while engaged in enforcing IC 16-42-19 or this chapter (or IC 16-6-8 before its repeal)." The Committee believes that this "does not apply" provision is an exception to liability which the Defendant must prove by a preponderance. See *Gilbert v. State*, 426 N.E.2d 1333 (Ind. Ct. App. 1981); *Burgin v. State*, 431 N.E.2d 864 (Ind. Ct. App. 1982). If the Defendant presents evidence of the exception, a separate instruction should be given on it, advising the jury that the crime "does not include" law enforcement personnel subject to the exception and that the burden is on the Defendant to prove by a preponderance that the exception applies.



**Instruction No. 8.59. Unlawful Duplication of Prescription Pads.****I.C. 35-48-4-14(e).**

The crime of unlawful duplication of prescription pads is defined by statute as follows:

A person who duplicates, reproduces, or prints any prescription pads or forms without the prior written consent of a practitioner commits a Class D felony. [This offense does not apply to the printing of prescription pads or forms upon a written, signed order place by a practitioner or pharmacist, by legitimate printing companies.]

To convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. [duplicated] [reproduced] [printed]
3. prescription [pads] [forms]
3. without the prior written consent of a practitioner.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of unlawful distribution of prescription pads, a Class D felony.

**Comments**

The term "practitioner" is defined by law. See I.C. 35-42-2-8 and 35-48k-1-24; Instruction No. 14.157.

A trial of unlawful distribution of prescription pads as a Class C felony must be bifurcated. See Chapter 15, Instruction 15.65.





## **Chapter 9**

### **BASIS OF LIABILITY**

- No. 9.01. Voluntary Conduct**
- No. 9.03. Voluntary Conduct — Possession of Property**
- No. 9.05. Culpability**
- No. 9.05a. Transferred Intent**
- No. 9.07. Territorial Jurisdiction — Conduct or Result Element in Indiana**
- No. 9.09. Territorial Jurisdiction — Homicide**
- No. 9.11. Territorial Jurisdiction — Homicide — Body Found in Indiana**



**Instruction No. 9.01. Voluntary Conduct.****I.C. 35-41-2-1(a).**

[When evidence raises an issue of voluntariness, modify the instruction defining the offense by adding the italicized material shown in the example below:]

The crime of theft is defined by statute as follows:

A person who knowingly or intentionally [*and voluntarily*] exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. [*and voluntarily*]
4. exerted unauthorized control over property of [name], another person
5. with intent to deprive [name the other person] of any part of the property's value or use.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of theft, a Class D felony, charged in Count \_\_\_\_\_.

(Text continued on page 9-3)

### Comments

"[O]nce evidence in the record raises the issue of voluntariness, the state must prove the Defendant acted voluntarily beyond a reasonable doubt. *Baird v. State*, 604 N.E.2d 1170, 1176 (Ind. 1992).

The authors decided not to write a general substantive definition of "voluntary." They note, however, the following italicized phrases in caselaw and suggest a phrase might be appropriate to use to supplement the "voluntary" conduct instruction in those cases in which the phrase fits the evidence. For example, when the defense contends that the physical act alleged as an element of the crime was in fact an uncontrollable spasm or reflex, the italicized language below in *Baird* could usefully be incorporated in the "voluntariness" instruction. Or, as another example, if the defense is "automatism," the italicized language below from *McClain* would probably help the jury:

Appellant has conflated the meaning of "voluntary act" with the concept of "irresistible impulse," which was formerly part of Indiana's insanity statute. I.C. 35-41-3-6. I.C. 35-41-3-6 was amended by P.L. 184-1984, Sec. 1, to eliminate the test of irresistible impulse; lacking substantial capacity to conform conduct to the requirements of law. *The requirement of a voluntary act was meant to exclude from the kind of conduct which may be considered criminal that which, in the ordinary sense, occurs beyond the control of the actor such as convulsions and reflexes.* Ind. Crim. Law Study Comm'n, Indiana Penal Code Proposed Final Draft, October 1974, at 12. See LaFave & Scott, Criminal Law 3.2; Model Penal Code 2.01(1). The evidence appellant points to as raising the issue of voluntariness thus actually would bear on the issue of "irresistible impulse," were that test still recognized as part of the insanity defense, but fails to provide a factual basis which would require the prosecution to prove beyond a reasonable doubt that appellant acted voluntarily.

*Baird v. State*, 604 N.E.2d 1170, 1176-77 (Ind. 1992).

Indiana Code § 35-41-2-1(a) provides that "[a] person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense." This section was enacted in 1976 pursuant to the recommendations of the Indiana Criminal Law Study Commission (hereafter "Commission"). See Ind.Crim.Law Study Comm'n, Indiana Penal Code Proposed Final Draft 11 (1974) (hereafter "Comm'n Report"). The Commission was established in 1973 by executive order and was given the task of revamping and updating the substantive criminal laws of the state. Because Indiana Code § 35-41-2-1 was modeled on the Commission's recommendations, the Commission's comments on the purpose of the statute are instructive. Before 1976, Indiana's criminal code lacked basic provisions governing culpability. The voluntary act statute was adopted that year in a new section titled "Basis of Liability," which also included mens rea definitions of "intentionally," "knowingly" and "recklessly" — terms now in familiar use in criminal cases. See 1976 Ind. Acts, P.L. 148, § 1, codified at IND. CODE § 35-41-2-2 (1993). The voluntary act statute codified the axiom that voluntariness is a "general element of criminal behavior" and reflected the premise that criminal responsibility "postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Comm'n Report at 11-12 (citation omitted). As the Commission explained: "The term voluntary is used in this Code as meaning behavior that is produced by an



*act of choice and is capable of being controlled by a human being who is in a conscious state of mind."*

. . . In essence McClain claims he was unable to form criminal intent on the night in question due to an automatistic state of mind that precluded voluntary behavior. . . . [w]e do not and need not decree the existence of an automatism defense per se, only that McClain is entitled to present evidence tending to show whether he acted voluntarily. Evidence of automatism is relevant to the issue of voluntariness.

*McClain v. State*, 678 N.E.2d 104, 107 (Ind. 1997) (emphasis added).

**Instruction No. 9.03. Voluntary Conduct — Possession of Property.**

**I.C. 35-41-2-1(b).**

Voluntary conduct is defined by statute as follows:

If possession of property constitutes any part of the prohibited conduct, it is a defense that the person who possessed the property was not aware of his possession for a time sufficient for him to have terminated his possession.

If you find that the Defendant was not aware of possession of the property for a time sufficient to have terminated possession, you should find the Defendant not guilty.



**Instruction No. 9.05. Culpability.****I.C. 35-41-2-2.**

[Intentionally] [Knowingly] [Recklessly] is defined by statute as follows:

A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so. [If a person is charged with intentionally causing a result by his conduct, it must have been his conscious objective not only to engage in the conduct but also to cause the result.]

A person engages in conduct "knowingly" if, when he engages in this conduct, he is aware of a high probability that he is doing so. [If a person is charged with knowingly causing a result by his conduct, he must have been aware of a high probability that his conduct would cause the result.]

A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct.

**Instruction 9.05a. Transferred Intent.**

The crime of [insert name of crime charged] is defined by law as follows:[insert definition of charged crime].

When a person intends to [insert action pertinent to charged crime -e.g., "touch" or "kill" or "damage"]

[another person]

[or]

[the property of another person]

and [instead] [in addition] [insert result pertinent to charged crime -e.g., "touches a different person" or "damages the property of a different person"], his intent is transferred from [the person] [the property] to [whom] [which] it was directed to [the person] [the property] actually [insert pertinent result -e.g., "touched" or "killed" or "damaged,"], and he may be found guilty of [insert crime charged -e.g., "battery" or "murder" or "criminal mischief"] of the [person who] [property which] was [insert pertinent result -e.g., "touched" or "killed" or "damaged"].

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. acting to
  - a. [knowingly] [intentionally]
  - b. [insert elements of charged crime and identity of intended victim - e.g., "kill person X" or "damage the property of person X without X's consent"]
3. and [instead] [in addition]
4. [insert elements of charged crime and identity of actual victim -e.g., "killed person Y" or "damaged the property of person Y without Y's consent"].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of [insert name of charged crime], a Class [insert grade of charged crime] [felony] [misdemeanor], charged in Count \_\_\_\_.



**Comments**

This instruction should be modified by omitting the terms and paragraphs which are not applicable to the crime as charged.

Statutes which define crimes without expressly providing for a culpability element must be construed by the court to determine whether such an element is implicit in the statutes and what the element is. The analysis the trial court has to make is set out in *State v. Keihn*, 542 N.E.2d 963 (Ind. 1989). In some of the instructions for particular offenses having no express culpability element, the Committee has included its recommendation of an implicit culpability element.

**Instruction No. 9.07. Territorial Jurisdiction — Conduct or Result Element in Indiana.**

**I.C. 35-41-1-1.**

[When evidence of territorial jurisdiction over the crime conflicts, modify the instruction defining the offense by adding the italicized material shown in the example below:]

The crime of theft is defined by statute as follows:

A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.

*The law requires that some part of the criminal conduct or result occur in Indiana.*

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. exerted unauthorized control
4. over property of another person [name]
5. with intent to deprive the other person [name] of any part of its value or use, and
6. *some part of the criminal conduct or result occurred in Indiana.*

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of theft, a Class D felony, charged in Count \_\_\_\_\_.

*(Text continued on page 9-9)*





**Comment**

The Indiana Court of Appeals has held that the State must prove territorial "jurisdiction" beyond a reasonable doubt. *McKinney v. State* (1990), Ind. App., 553 N.E.2d 860 (Ind. Ct. App. 1990). It is not clear whether the majority opinion in this case would require an instruction on territorial "jurisdiction" in every case. The concurring opinion suggests an instruction would not be necessary if "territorial jurisdiction is . . . evident."

The *McKinney* majority and concurrence suggest that territorial "jurisdiction" is not, strictly speaking, an "element" of the crime. But from the point of view of the jury there is, functionally, no difference between the two. For this reason, the suggested instruction for situations in which there is a factual issue as to territorial "jurisdiction" simply treats the issue as though it were an element of the crime. This technical irregularity avoids a cumbersome and potentially confusing instruction on how "beyond a reasonable doubt" applies not just to "elements" but also to the not-so-obviously distinct "jurisdictional fact" of "territorial jurisdiction."



**Instruction No. 9.09. Territorial Jurisdiction — Homicide.****I.C. 35-41-1-1.**

[When evidence of territorial jurisdiction over a homicide conflicts, modify the instruction defining the offense by inserting the italicized language appearing in the example below:]

The crime of murder is defined by statute as follows:

A person who knowingly or intentionally kills another human being commits murder, a felony.

*Statute also requires that the death of the victim or the bodily impact causing death occur in Indiana.*

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. knowingly or intentionally
3. killed
4. [name], and
5. [name] died in Indiana

[or]

*the bodily impact which caused [name's] death occurred in Indiana.*

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of murder, a felony, charged in Count \_\_\_\_\_.

**Comment**

*McKinney v. State* (1990), Ind. App., 553 N.E.2d 860, held that an instruction must be given on territorial "jurisdiction" when the evidence on that issue conflicts. *McKinney* also held that the State must prove this jurisdictional fact beyond a reasonable doubt. *But see Pollard v. State* (1979), 270 Ind. 599, 388 N.E.2d 496.

I.C. 35-41-1-1 provides that in homicide cases territorial jurisdiction can be proven in either of the two ways indicated in the instruction above. That statute also provides that when a body is found in Indiana "it is presumed" that the death or the bodily impact causing death occurred in Indiana. For an instruction on this presumption, see Instruction No. 9.11.



**Instruction No. 9.11. Territorial Jurisdiction — Homicide — Body Found in Indiana.****I.C. 35-41-1-1.**

You may consider evidence that [name's] body was found in Indiana as evidence tending to prove either (1) that [name] died in Indiana or (2) that any bodily impact which may have caused [name's] death occurred in Indiana.

**Comment**

This is an instruction on the I.C. 35-41-1-1 "presumption" of territorial homicide jurisdiction from the fact that the body was found in Indiana. See *McKinney v. State* (1990), Ind. App., 553 N.E.2d 860.



(Rel. 3-12-03 Pub.63122)

# **CHAPTER 10**

## **DEFENSES RELATING TO CULPABILITY**

### **SYNOPSIS**

- Instruction No. 10.01. Legal Authority.**
- Instruction No. 10.02. Defense of Parent to Exercise Reasonable Discipline.**
- Instruction No. 10.03A. Use of Force to Protect Person.**
- Instruction No. 10.03B. Use of Force to Protect Dwelling.**
- Instruction No. 10.03C. Use of Force to Protect Property.**
- Instruction No. 10.03D. Use of Force Against a Public Servant to Protect Person.**
- Instruction No. 10.03E. Use of Force Against a Public Servant to Protect Dwelling, Curtilage, or Motor Vehicle.**
- Instruction No. 10.03F. Use of Force Against a Public Servant to Protect Property.**
- Instruction No. 10.03G. Use of Deadly Force Against a Public Servant.**
- Instruction No. 10.05A. Citizen's Use of Reasonable Force Relating to Arrest or Escape.**
- Instruction No. 10.05B. Law Enforcement Officer's Use of Force Relating to Arrest or Escape.**
- Instruction No. 10.07. Intoxication—Involuntary.**
- Instruction No. 10.09. Intoxication—Voluntary.**
- Instruction No. 10.11. Mistake of Fact.**
- Instruction No. 10.13. Duress.**
- Instruction No. 10.15. Entrapment.**
- Instruction No. 10.17. Abandonment.**
- Instruction No. 10.19. Accident.**
- Instruction No. 10.21. Alibi.**
- Instruction No. 10.23. Necessity.**



## INTRODUCTION

When a defense is raised properly and the evidence supports an instruction on it, the form of the pattern instruction on the crime must be altered to accommodate the defense. The Committee has two different pattern formats for defenses, one to be used with defenses the Defendant must prove and the other to be used for defenses the State must disprove.

Give the altered crime-defining pattern with a separate instruction defining the defense. This Chapter contains instructions defining defenses of general application, except for the insanity defense which is addressed in Chapter 11.

## DETERMINING WHO HAS BURDEN OF PERSUASION

To determine which side has the burden of persuasion for a defense, check caselaw and statutes for the individual defense. The "Comments" to the individual defense definitional instructions in this Chapter indicate the status of the law on burden at the time this edition went to press in late fall 2003, but the Committee recommends checking for subsequent cases or statutes.

## PATTERNS WHEN THE STATE HAS THE BURDEN TO DISPROVE

If the burden of persuasion with a defense rests on the State, the following general pattern should be used to incorporate the defense into the instruction on the elements of the crime:

**The crime of \_\_\_\_\_ is defined by law as follows:**

**A person who \_\_\_\_\_ commits \_\_\_\_\_, a Class \_\_\_\_\_ felony/misdemeanor.**

**Before you may convict the Defendant, the State must have proved each of the following:**

1. The Defendant
2. [List element]
3. [List element]
4. and Defendant

[was not entrapped]

[was not acting under duress]

[was not acting in defense of a person]

[was not acting in defense of his/her dwelling]

[was not acting in defense of property]

[was not acting from necessity]

[was not involuntarily intoxicated]

[did not act under a mistake of fact].

**If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of \_\_\_\_\_ a Class**

\_\_\_\_\_ felony/misdemeanor as charged in Count \_\_\_\_\_.

*(Text continued on page 10-3)*





**PATTERNS WHEN THE DEFENDANT HAS THE BURDEN TO PROVE**

If the burden of persuasion rests upon the Defendant, the end of the basic instruction should be modified to add a final paragraph as illustrated below:

The crime of \_\_\_\_\_ is defined by law as follows:

A person who \_\_\_\_\_ commits \_\_\_\_\_, a Class \_\_\_\_\_ felony/misdemeanor.

Before you may convict the Defendant, the State must have proved each of the following:

1. The Defendant
2. [List element]
3. [List element].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of \_\_\_\_\_, a Class \_\_\_\_\_ felony/misdemeanor as charged in Count \_\_\_\_\_.

If the State did prove each of these elements beyond a reasonable doubt, but the Defendant proved by a preponderance of the evidence that [name or describe defense], you must find the Defendant not guilty of \_\_\_\_\_, a Class \_\_\_\_\_ felony/misdemeanor as charged in Count \_\_\_\_\_.

**NOTE ON ALLOCATION OF BURDEN OF PERSUASION**

The burden of proving a defense may be placed on the defendant so long as proving the defense does not require the defendant to negate an element of the crime. *Martin v. Ohio*, 480 U.S. 228, 233-34, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987) . . . . If the defense specifically negates an element of the crime, however, the State has the burden to prove beyond a reasonable doubt the absence of the defense. *Blatchford v. State*, 832 N.E.2d 710, 782-32 (Ind. Ct. App. 1996).

*Moon v. State*, 823 N.E.2d 710, 714 (Ind. Ct. App. 2005).



**Instruction No. 10.01. Legal Authority.****I.C. 35-41-3-1.**

A person may not be convicted for engaging in conduct that would otherwise be a crime if he has legal authority to engage in the conduct.

It is an issue in this case whether the Defendant had legal authority to [describe prohibited conduct.] Under Indiana law, a person is authorized to [describe prohibited conduct] when [describe applicable circumstances.]

The State has the burden of proving beyond a reasonable doubt that the Defendant did not have legal authority.

**Comments**

This statute was intended to incorporate legal authority that is conferred by the criminal code, caselaw, or other sources. An example is discipline of a child by a parent. The Committee contemplates that “applicable circumstances” will refer to the common law or statute that exempts or excuses the otherwise criminal conduct. The Committee also contemplates that this instruction will be given in addition to the modified elements instruction that includes as an element this defense. The Committee also recommends that this instruction not be given in any case where a specific defense is provided under I.C. 35-41-3 or other statute.

To date, the only legal authority defense addressed in caselaw is the authority of a parent to administer reasonable discipline which is not cruel or excessive. For this reasonable discipline defense, use Instruction No. 10.02 hereafter

**Instruction No. 10.02. Defense of Parent to Exercise Reasonable Discipline.**

It is a defense to the charge of \_\_\_\_\_ that the Defendant was the parent of [name alleged victim] and that Defendant's alleged conduct was the use by Defendant upon [name alleged victim] of (reasonable force) (reasonable confinement) which Defendant reasonably believed to be necessary for [name alleged victim]'s proper control, training, or education.

In determining whether Defendant's conduct was such reasonable discipline, you may consider:

1. whether the Defendant was [(name alleged victim)'s parent] [authorized to exercise parental authority over (name alleged victim)];
2. (name alleged victim)'s age, sex, and physical and mental condition;
3. the influence of (name alleged victim)'s example upon other children of the same family or group;
4. whether the alleged (force) (confinement) was reasonably necessary and appropriate to compel obedience to a proper command to (name alleged victim);
5. whether the alleged (force) (confinement) was:
  - disproportionate to (name alleged victim)'s behavior, and/or
  - unnecessarily degrading, and/or
  - likely to cause serious or permanent harm;
6. [insert any other factor unique to the case that should be considered].

In considering these factors, you should balance them against each other, giving each the weight you find was appropriate under the circumstances in determining whether the alleged (force) (confinement) was reasonable discipline.

The State has the burden to prove beyond a reasonable doubt that:

- a. the (force) (confinement) Defendant used was unreasonable.
- or
- b. Defendant's belief that the (force) (confinement) used was necessary to control the child and to prevent misconduct was unreasonable.

If you find that the State has not proved a. or b. above beyond a reasonable doubt, you may not convict the Defendant of (name alleged offense), a Class \_\_\_\_\_ felony.

**Comments**

This instruction is based on the Restatement of Torts (Second) §§ 147(1) and 150 (1965), as adopted for the Indiana parental discipline defense by *Willis v. State*, 888 N.E.2d 177 (Ind. 2008).



**Instruction No. 10.03A. Use of Force to Protect Person.**

**I.C. 35-41-3-2.**

It is an issue whether the Defendant acted in (self-defense) or (defense of another person).

A person may use reasonable force against another person to protect (himself/herself from what he/she) or (someone else) from what the Defendant reasonably believes to be the imminent use of unlawful force.

A person is justified in using deadly force, and does not have a duty to retreat, only if he/she reasonably believes that deadly force is necessary (to prevent serious bodily injury to himself/herself or a third person) or (to prevent the commission of a felony).

(However, a person may not use force if:

(he/she is committing a crime that is directly and immediately connected to the (confrontation) *(use a descriptive term based on evidence)*.)

(he/she is escaping after the commission of a crime that is directly and immediately connected to the (confrontation) *(use a descriptive term based on evidence)*.)

(he/she provokes a fight with another person with intent to cause bodily injury to that person).

(he/she has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight).

The State has the burden of proving beyond a reasonable doubt that the Defendant did not act in self-defense.

**Comments**

[T]here must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.

*Mayes v. State*, 744 N.E.2d 390 (Ind. 2001).

The committing a crime limits apply only when defendant “was actively engaged in the perpetration of a crime, and that criminal activity produced the confrontation wherein the force was employed.” *Harvey v. State*, 652 N.E.2d 876 (Ind. Ct. App. 1995), *transfer denied* (homicide defendant entitled to invoke self-defense even though at time of alleged murder he had no license for his pistol and hence was committing the offense of possession of a handgun without a license).

When a claim of self defense is raised and finds support in the evidence, the burden to disprove this offense beyond a reasonable doubt rests on the State. *Wilson v. State*, 770 N.E.2d 799 (Ind. 2002).

The terms “deadly force,” “bodily injury,” and “serious bodily injury” are

defined by law. See I.C. 35-41-1-7, I.C. 35-41-1-4, and I.C. 35-41-1-25; Instruction Nos. 14.49, 14.13, and 14.185.



**Instruction No. 10.03B. Use of Force to Protect Dwelling.****I.C. 35-41-3-2.**

It is an issue whether the Defendant acted in defense of his/her dwelling (or adjoining property).

A person may use reasonable force, including deadly force, against another person, and does not have a duty to retreat, if he/she reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on (his/her dwelling), (the land adjoining his/her dwelling, including buildings, used for domestic purposes), or (his/her occupied motor vehicle).

(However, a person may not use force if:

(he/she is committing a crime that is directly and immediately connected to the (entry or attack on his dwelling) (*use a descriptive term based on evidence*)]

(he/she is escaping after the commission of a crime that is directly and immediately connected to the (entry or attack on his dwelling) (*use a descriptive term based on evidence*)]

(he/she provokes a fight with another person with intent to cause bodily injury to that person)

(he/she has willingly entered into a fight with another person or started the fight, unless he/she withdraws from the fight and communicates to the other person his/her intent to withdraw and the other person nevertheless continues or threatens to continue the fight].)

The State has the burden of proving beyond a reasonable doubt that the Defendant did not act in defense of (his/her dwelling), (the land adjoining his/her dwelling, including buildings, used for domestic purposes), or (his/her occupied motor vehicle).

**Comments**

The statute here applies to attacks or entries on defendant's "curtilage." Few jurors will know what "curtilage" means and so the Committee has not employed it in the instruction. The Committee suggests that the "land adjoining the dwelling, including buildings, used for domestic purposes" appearing above will suffice in most cases to define "curtilage." In cases where a "curtilage" issue is in serious dispute, the trial judge may wish to use Instruction No. 14.42's more elaborate definition for "curtilage," derived from *Fox v. State*, 179 Ind. App. 267, 384 N.E.2d 1159 (1979) ("curtilage" as used in common-law definition of arson).

The "committing a crime" or "escaping after the commission of a crime" limits on this defense do not apply if defendant was "coincidentally committing some (unrelated) criminal offense." The limits apply only when defendant "was actively engaged in the perpetration of a crime, and that criminal activity produced the confrontation wherein the force was employed." *Harvey v. State*, 652 N.E.2d 876 (Ind. Ct. App. 1995), *transfer denied* (homicide defendant entitled to invoke self-defense even though at time of alleged murder he had no license for his pistol and hence was committing the offense of possession of a handgun without a

license). *See also Mayes v. State*, 744 N.E.2d 390 (Ind. 2001) (“There must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.”)

When a claim of self defense is raised and finds support in the evidence, the burden to disprove this offense beyond a reasonable doubt rests on the State. *Wilson v. State*, 770 N.E.2d 799 (Ind. 2002).

The terms “deadly force,” “dwelling,” “bodily injury,” and “serious bodily injury” are defined by law. *See* I.C. 35-41-1-7, I.C. 35-41-1-10, I.C. 35-41-1-4, and I.C. 35-41-1-25; Instruction Nos. 14.49, 14.75, 14.13, and 14.185.



**Instruction No. 10.03C. Use of Force to Protect Property.**

**I.C. 35-41-3-2.**

It is an issue whether the Defendant acted in defense of his/her property.

[With respect to property other than (a dwelling), (the land adjoining a dwelling, including buildings, used for domestic purposes), or (an occupied motor vehicle),] (A) person may use reasonable force, but not deadly force, against another person if he reasonably believes that the force is necessary to immediately prevent or terminate the other person's (trespass on) (or) (criminal interference with) property (lawfully in Defendant's possession) (or) (lawfully in possession of a member of Defendant's immediate family) (or) (belonging to a person whose property Defendant has authority to protect).

(However, a person may not use force if:

(he/she is committing a crime that is directly and immediately connected to the trespass or criminal interference with the property (lawfully in Defendant's possession) (or) (lawfully in possession of a member of Defendant's immediate family) (or) (belonging to a person whose property Defendant has authority to protect) *(use a descriptive term based on evidence).*)

(he/she is escaping after the commission of a crime that is directly and immediately connected to the property (lawfully in Defendant's possession) (or) (lawfully in possession of a member of Defendant's immediate family) (or) (belonging to a person whose property Defendant has authority to protect)) *(use a descriptive term based on evidence).*)

(he/she provokes a fight with another person with intent to cause bodily injury to that person)

(he/she has willingly entered into a fight with another person or started the fight, unless he/she withdraws from the fight and communicates to the other person his/her intent to withdraw and the other person nevertheless continues or threatens to continue the fight).)

The State has the burden of proving beyond a reasonable doubt that the Defendant did not act in defense of his/her property.

**Comments**

If there is no evidence suggesting the property being protected was the defendant's dwelling or in his curtilage, omit the brack-

**[Next Page is 10-13]**

eted first phrase in the first sentence.

If there is an issue whether the property defendant was protecting was or was not part of the “curtilage,” *see* the definitions for “curtilage” in Instruction No. 10.03B and its Commentary.

The “committing a crime” or “escaping after the commission of a crime” limits on this defense do not apply if defendant was “coincidentally committing some (unrelated) criminal offense.” The limits apply only when defendant “was actively engaged in the perpetration of a crime, and that criminal activity produced the confrontation wherein the force was employed.” *Harvey v. State*, 652 N.E.2d 876 (Ind. Ct. App. 1995), *transfer denied* (homicide defendant entitled to invoke self-defense even though at time of alleged murder he had no license for his pistol and hence was committing the offense of possession of a handgun without a license). *See also Mayes v. State*, 744 N.E.2d 390 (Ind. 2001) (“There must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.”)

When a claim of self defense is raised and finds support in the evidence, the burden to disprove this offense beyond a reasonable doubt rests on the State. *Wilson v. State*, 770 N.E.2d 799 (Ind. 2002).

The terms “deadly force,” “dwelling,” and “bodily injury” are defined by law. *See* I.C. 35-41-1-7, I.C. 35-41-1-10, I.C. 35-41-1-4, and I.C. 35-41-1-25; Instruction Nos. 14.49, 14.75, and 14.13.



**Instruction No. 10.03D. Use of Force Against a Public Servant to Protect Person.**

**I.C. 35-41-3-2.**

It is an issue whether the Defendant acted against a public servant in lawful [self-defense] [defense of another person].

A person may use reasonable force against a public servant to protect (the person) (someone else) from what the person reasonably believes to be the imminent use of unlawful force.

[However, a person may not use force against a public servant if:

(the person is committing a crime that is directly and immediately connected to the (confrontation with the public servant)) (*use a descriptive term based on evidence*).]

or

(the person is escaping after the commission of a crime that is directly and immediately connected to the (confrontation with the public servant)) (*use a descriptive term based on evidence*).]

or

(while acting with the intent to cause bodily injury to the public servant, the person provokes action by the public servant).]

or

(the person has entered into a fight with the public servant or has started the fight, unless the person withdraws from the fight and communicates to the law enforcement officer the person's intent to withdraw and the law enforcement officer nevertheless continues or threatens to continue unlawful action).]

or

the person reasonably believes the public servant is acting lawfully or engaged in the lawful execution of the public servant's official duties.]

The State has the burden of proving beyond a reasonable doubt that the Defendant did not act in lawful self-defense.

**Comments**

Under the law authorizing self-defense against a person who is *not* a public servant, the prohibition of the defense when the defendant is committing a crime applies only when there is an immediate connection between the crime and the confrontation:

[T]here must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.

*Mayes v. State*, 744 N.E.2d 390, 394 (Ind. 2001).

It has also been held, under the law authorizing self-defense against a person who is *not* a public servant, that the prohibition of the defense when defendant is committing a crime applies only when defendant “was actively engaged in the perpetration of a crime, and that criminal activity produced the confrontation wherein the force was employed.” *Harvey v. State*, 652 N.E.2d 876, 877 (Ind. Ct. App. 1995), *transfer denied* (Jan. 24, 1996) (homicide defendant entitled to invoke self-defense even though at time of alleged murder he had no license for his pistol and hence was committing the offense of possession of a handgun without a license).

The *Mayes* and *Harvey* cases appear equally applicable to the instant offense, and the instruction above accordingly uses language derived from their holdings.

When a claim of self-defense is raised and finds support in the evidence, the burden to disprove this defense beyond a reasonable doubt rests on the State. *Wilson v. State*, 770 N.E.2d 799 (Ind. 2002).

The terms “bodily injury” and “public servant” are defined by law. *See* I.C. 35-41-1-4 and I.C. 35-41-3-2; Instruction Nos. 14.13 and 14.169A.



**Instruction No. 10.03E. Use of Force Against a Public Servant to Protect Dwelling, Curtilage, or Motor Vehicle.**

**I.C. 35-41-3-2.**

It is an issue whether the Defendant acted against a public servant in lawful defense of property.

A person may lawfully use reasonable force against a public servant if the person reasonably believes that the force is necessary to prevent or terminate the public servant's entry of or attack on (the person's dwelling) (the land adjoining the person's dwelling, including buildings, used for domestic purposes) (the person's occupied motor vehicle).

[However, a person may not use force against a public servant if:

(the person is committing a crime that is directly and immediately connected to the (confrontation with the public servant)) (*use a descriptive term based on evidence*).]

or

(the person is escaping after the commission of a crime that is directly and immediately connected to the (confrontation with the public servant)) (*use a descriptive term based on evidence*).]

or

(while acting with the intent to cause bodily injury to the public servant, the person provokes action by the public servant).]

or

(the person has entered into a fight with the public servant or has started the fight, unless the person withdraws from the fight and communicates to the law enforcement officer the person's intent to withdraw and the law enforcement officer nevertheless continues or threatens to continue unlawful action).]

or

the person reasonably believes the public servant is acting lawfully or engaged in the lawful execution of the public servant's official duties.]

The State has the burden of proving beyond a reasonable doubt that the Defendant did not use reasonable force in defense of (his/her dwelling) (the land adjoining his/her dwelling, including buildings, used for domestic purposes) (his/her occupied motor vehicle).

**Comments**

The statute here applies to attacks or entries on defendant's "curtilage." Few jurors will know what "curtilage" means and so the Committee has not employed it in the instruction. The Committee suggests that the "land adjoining the dwelling, including buildings, used for domestic purposes" appearing above will suffice in most cases to define "curtilage." In cases where a "curtilage" issue is in serious

dispute, the trial judge may wish to use Instruction No. 14.42's more elaborate definition for "curtilage," derived from *Fox v. State*, 179 Ind. App. 267, 384 N.E.2d 1159 (1979) ("curtilage" as used in common-law definition of arson).

Under the law authorizing self-defense against a person who is *not* a public servant, the prohibition of the defense when the defendant is committing a crime applies only when there is an immediate connection between the crime and the confrontation:

(T)here must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.

*Mayes v. State*, 744 N.E.2d 390, 394 (Ind. 2001).

It has also been held, under the law authorizing self-defense against a person who is *not* a public servant, that the prohibition of the defense when defendant is committing a crime applies only when defendant "was actively engaged in the perpetration of a crime, and that criminal activity produced the confrontation wherein the force was employed." *Harvey v. State*, 652 N.E.2d 876, 877 (Ind. Ct. App. 1995), *transfer denied* (Jan. 24, 1996) (homicide defendant entitled to invoke self-defense even though at time of alleged murder he had no license for his pistol and hence was committing the offense of possession of a handgun without a license).

The *Mayes* and *Harvey* cases appear equally applicable to the instant offense, and the instruction above accordingly uses language derived from their holdings.

When a claim of self-defense is raised and finds support in the evidence, the burden to disprove this defense beyond a reasonable doubt rests on the State. *Wilson v. State*, 770 N.E.2d 799 (Ind. 2002).

The terms "bodily injury" and "public servant" are defined by law. See I.C. 35-41-1-4 and I.C. 35-41-3-2; Instruction Nos. 14.13 and 14.169A.



**Instruction No. 10.03F. Use of Force Against a Public Servant to Protect Property.**

**I.C. 35-41-3-2.**

It is an issue whether the Defendant acted against a public servant in lawful defense of property.

A person may lawfully use reasonable force against a public servant if the person reasonably believes that the force is necessary to prevent or terminate the public servant's [unlawful trespass on] [criminal interference with] property [lawfully in the person's possession] [lawfully in the possession of a member of the person's immediate family] [belonging to another person when the person has the authority to protect it].

[However, a person may not use force against a public servant if:

(the person is committing a crime that is directly and immediately connected to the (confrontation with the public servant)) (*use a descriptive term based on evidence*).]

or

(the person is escaping after the commission of a crime that is directly and immediately connected to the (confrontation with the public servant)) (*use a descriptive term based on evidence*).]

or

(while acting with the intent to cause bodily injury to the public servant, the person provokes action by the public servant).]

or

(the person has entered into a fight with the public servant or has started the fight, unless the person withdraws from the fight and communicates to the law enforcement officer the person's intent to withdraw and the law enforcement officer nevertheless continues or threatens to continue unlawful action).]

or

the person reasonably believes the public servant is acting lawfully or engaged in the lawful execution of the public servant's official duties.]

The State has the burden of proving beyond a reasonable doubt that the Defendant did not act against a public servant in lawful defense of property.

**Comments**

If there is an issue whether the property defendant was protecting was or was not part of the "curtilage," see the definitions for "curtilage" in Instruction No. 10.03B and its Commentary.

Under the law authorizing self-defense against a person who is *not* a public servant, the prohibition of the defense when the defendant is committing a crime applies only when there is an immediate connection between the crime and the confrontation:

(T]here must be an immediate causal connection between the crime and the confrontation. Stated differently, the evidence must show that but for the defendant committing a crime, the confrontation resulting in injury to the victim would not have occurred.

*Mayes v. State*, 744 N.E.2d 390, 394 (Ind. 2001).

It has also been held, under the law authorizing self-defense against a person who is *not* a public servant, that the prohibition of the defense when defendant is committing a crime applies only when defendant “was actively engaged in the perpetration of a crime, and that criminal activity produced the confrontation wherein the force was employed.” *Harvey v. State*, 652 N.E.2d 876, 877 (Ind. Ct. App. 1995), *transfer denied* (Jan. 24, 1996) (homicide defendant entitled to invoke self-defense even though at time of alleged murder he had no license for his pistol and hence was committing the offense of possession of a handgun without a license).

The *Mayes* and *Harvey* cases appear equally applicable to the instant offense, and the instruction above accordingly uses language derived from their holdings.

When a claim of self-defense is raised and finds support in the evidence, the burden to disprove this defense beyond a reasonable doubt rests on the State. *Wilson v. State*, 770 N.E.2d 799 (Ind. 2002).

The terms “bodily injury” and “public servant” are defined by law. *See* I.C. 35-41-1-4 and I.C. 35-41-3-2; Instruction Nos. 14.13 and 14.169A.



**Instruction No. 10.03G. Use of Deadly Force Against a Public Servant.****I.C. 35-41-3-2.**

It is an issue whether the Defendant lawfully used deadly force against a public servant.

A person is not justified in using deadly force against a public servant whom the person knows or reasonably should know is a public servant unless

- (1) the person reasonably believes that the public servant is (acting unlawfully) (not engaged in the execution of the public servant's official duties) and
- (2) the deadly force is reasonably necessary to prevent serious bodily injury to the person or a third person.

The State has the burden of proving beyond a reasonable doubt that the Defendant did not lawfully use deadly force against a public servant.

**Comment**

It is established that when a claim of self-defense is raised and finds support in the evidence, the burden to disprove the defense beyond a reasonable doubt rests on the State. *Wilson v. State*, 770 N.E.2d 799 (Ind. 2002). Based on *Wilson*, this case requires the State to disprove the defense as well.

The terms "deadly force," "public servant," and "serious bodily injury" are defined by law. See I.C. 35-41-1-7, I.C. 35-41-3-2, and I.C. 35-41-1-25; Instruction Nos. 14.47, 14.169A, and 14.185.

**Instruction No. 10.05A. Citizen's Use of Reasonable Force Relating to Arrest or Escape.**

**I.C. 35-41-3-3.**

A person other than a law enforcement officer is justified in using reasonable force against another person to effect that person's arrest or prevent that person's escape if:

1. a felony has been committed; and
2. there is probable cause to believe the other person committed that felony.

The felony of *[name felony Defendant asserts was committed by arrested person]* is defined as *[define felony]*.

It is a defense to the charge of *[name offense charged]* that

1. The felony of *[name felony Defendant asserts was committed by arrested person]* had in fact been committed, and
2. The Defendant knew that *[name felony]* had been committed, and
3. Based on all the circumstances known to the Defendant there was a reasonable probability *[name arrested person]* had committed the felony, and
4. The Defendant used reasonable nondeadly force to *[arrest (name arrested person)] [prevent (name arrested person) from escaping]*.

The State has the burden of disproving this defense beyond a reasonable doubt.

*(Text continued on page 10-15)*





**Comments**

There is no Indiana decision stating where the burden of proof lies. Nationally, "[t]he burden of persuasion is nearly always on the state, beyond a reasonable doubt." P. Robinson, *CRIMINAL LAW DEFENSES* § 142(a) (West 1984).



**Instruction No. 10.05B. Law Enforcement Officer's Use of Force Relating to Arrest or Escape.**

I.C. 35-41-3-3.

[A law enforcement officer is justified in using reasonable force if he/she reasonably believes that the force is necessary to effect a lawful arrest. However, an officer is justified in using deadly force only the officer:

1. has probable cause to believe that deadly force is necessary

to prevent the commission of a forcible felony

or

to effect an arrest of a person whom the officer has probable cause to believe poses a threat of serious bodily injury to the officer or a third person]

and

- (2) has given a warning, if feasible, to the person against whom the deadly force is to be used.

[ A law enforcement officer making an arrest under an invalid warrant is justified in using force as if the warrant was valid, unless he knows that the warrant is invalid.]

[A law enforcement officer who has an arrested person in his custody is justified in using the same force to prevent the escape of the arrested person from his custody that he would be justified in using if he was arresting that person. ]

[A guard or other official in a penal facility or a law enforcement officer is justified in using reasonable force, including deadly force, if he reasonably believes that the force is necessary to prevent the escape of a person who is detained in the penal facility. ]

The State has the burden of disproving this defense beyond a reasonable doubt.

**Comments**

The terms "deadly force," "law enforcement officer," "serious bodily injury," "penal facility" and "forcible felony" are defined by law. See I.C. 35-41-1-7, I.C. 35-41-1-17, I.C. 35-41-1-25, I.C. 35-41-1-21 and I.C. 35-41-1-11; Instruction Nos. 14.47, 14.123, 14.185, 14.149 and 14.89.

"The burden of persuasion is nearly always on the state, beyond a

reasonable doubt." P. Robinson, CRIMINAL LAW DEFENSES § 134 (West 1984).



**Instruction No. 10.07 Intoxication — Involuntary.**

I.C. 35-41-3-5.

Involuntary intoxication is a defense to the crime of [No Textpos Rule Present] Involuntary intoxication occurs when the Defendant commits the crime charged while intoxicated and the intoxication has resulted from the introduction of a substance into the body of the Defendant [without Defendant's consent] [when the Defendant did not know the substance might cause intoxication.]

Involuntary intoxication is a defense to the crime charged if the intoxication rises to the level that the Defendant was unable to appreciate the wrongfulness of the conduct at the time of the offense.

The Defendant has the burden to prove the defense of involuntary intoxication by a preponderance of the evidence.

*(Text continued on page 10-19)*

**Comments**

There is no clear statement in Indiana caselaw or statute as to where the burden of persuasion lies for this defense. The effect of the intoxication on the defendant — inability to appreciate wrongfulness of conduct — is the same as provided for the insanity defense, I.C. 35-41-3-6, and as it has been held that the I.C. 35-41-4-1 provision assigning the burden of proof for insanity to the defendant is constitutional, *Ward v. State*, 438 N.E.2d 750 (Ind. 1982), it would seem that the burden for involuntary intoxication *could* also constitutionally be given to the defendant. Several states have so held. *Gilchrist v. Kincheloe*, 589 F.Supp. 291 (E.D. Wash. 1984), *affirmed* 774 F.2d 1173 (9th Cir. 1985); *State v. Figueroa*, 726 P.2d 629 (Ariz. App. 1986). But it is not clear that the burden of proof on the defense in Indiana is given to the defendant. The Committee advises that an interlocutory appeal of the issue be encouraged. It is the Committee's judgment that the burden for the defense will most likely be placed on the defendant, by a preponderance of the evidence.



**Instruction No. 10.09. Intoxication — Voluntary.****I.C. 35-41-2-5, I.C. 35-41-3-5.**

Voluntary intoxication is not a defense to a charge of [*insert name of crime.*] You may not take voluntary intoxication into consideration in determining whether the Defendant acted [intentionally] [knowingly] [recklessly] as alleged in the [information] [indictment].

**Comments**

This instruction is to be given when the charged crime was committed on or after July 1, 1997 and evidence that the defendant was intoxicated has been admitted.

The Indiana Supreme Court has held that the 1997 legislative abolition of the voluntary intoxication defense is to be given effect under the Indiana and federal Constitutions. *Sanchez v. State*, 749 N.E.2d 509 (Ind. 2001).



**Instruction No. 10.11. Mistake of Fact.****I.C. 35-41-3-7.**

It is an issue whether the Defendant mistakenly committed the acts charged.

It is a defense that the Defendant was reasonably mistaken about a matter of fact if the mistake prevented the Defendant from:

[intentionally] [knowingly] [recklessly] committing the acts charged

[or]

[committing the acts charged with specific intent to (*specify specific intention for crime*)].

The State has the burden of proving beyond a reasonable doubt that the Defendant was not reasonably mistaken.

**Comments**

Requiring the defendant to establish a factual basis for entitlement to a mistake instruction does not impermissibly shift the burden of proof since the state retains the ultimate burden of proving beyond a reasonable doubt every element of the charged crime, including culpability or intent, which would in turn entail proof that there was no reasonably held mistaken belief of fact.

*Hoskins v. State*, 563 N.E.2d 571 (Ind. 1990).



**Instruction No. 10.13. Duress.****I.C. 35-41-3-8.**

It is an issue whether the Defendant was acting under duress.

It is a defense that the Defendant was compelled to commit the acts charged by threat of imminent serious bodily injury to himself or another person. [With respect to offenses other than felonies, it is a defense that the Defendant was compelled to commit the acts charged by force or threat of force.] Compulsion exists only if the force, threat, or circumstances would render a reasonable person incapable of resisting the pressure.

[This defense does not apply to a person who [recklessly, knowingly, or intentionally placed himself in a situation where it was foreseeable that he would be subjected to duress] [committed an offense against the person as defined in IC 35-42]. ]

The State has the burden of proving beyond a reasonable doubt that the Defendant was not acting under duress.

**Comments**

The term "serious bodily injury" is defined by law. See I.C. 35-41-1-25; Instruction No. 14.185.

No Indiana cases appear to have addressed expressly where the burden lies. P. Robinson, *CRIMINAL LAW DEFENSES* § 177(a) (West 1984) said in 1984 that the burden of persuasion "is often on the state, beyond a reasonable doubt," but notes cases to the contrary in the main volume and the 2003 Pocket Part. The Committee has concluded that the best position is that the burden rests on the State.



**Instruction No. 10.15 Entrapment.****I.C. 35-41-3-9.**

The defense of entrapment is an issue in this case.

In order to overcome this defense, the State must prove beyond a reasonable doubt:

1. that the prohibited conduct of the Defendant was not the product of [a law enforcement officer] [or] [a law enforcement officer's agent] using persuasion or other means likely to cause the Defendant to engage in the conduct, or
2. that the Defendant was predisposed to commit the offense.

Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

**Comments**

The State avoids the defense of entrapment by disproving either of the two elements required for the defense. *Albaugh v. State*, 721 N.E.2d 1233 (Ind. 1999).



**Instruction No. 10.17. Abandonment.****I.C. 35-41-3-10.**

It is a defense to a charge of [aiding, inducing, or causing an offense] [attempt] [conspiracy] that the Defendant abandoned [his] [her] effort to commit the [*insert name of crime attempted, conspired to, or aided*] and prevented its commission.

To constitute a valid defense, the abandonment must have been a complete and voluntary giving up of the criminal purpose. The abandonment was not voluntary if motivated:

- 1) in whole or in part;
- 2) by circumstances not present or apparent when Defendant began [his] or [her] course of conduct;
- 3) when those circumstances
  - a. increased the probability of detection or apprehension, or
  - b. made commission of the crime more difficult.

A decision to postpone the criminal conduct or to change the objective or victim does not constitute abandonment.

The State has the burden of disproving this defense beyond a reasonable doubt.

**Comments**

The State has the burden to disprove this defense beyond a reasonable doubt, and it is appropriate to instruct the jury on what makes an abandonment voluntary. *Gravens v. State*, 836 N.E.2d 490 (Ind. Ct. App. 2005), *transfer denied*.

The Committee's Instruction is based on the following language from *Gravens*:

The State also tendered its own proposed instruction on the issue of abandonment. The State's tendered instruction was identical to *Gravens*', with the following additional clause ("Paragraph Three") inserted between the second and third sentences of Pattern Instruction 10.17:

To be considered voluntary, the Defendant's decision to abandon must originate with the Defendant and must in no way be attributable to the influence of extrinsic circumstances. To be

considered voluntary, the Defendant's decision to abandon can not be the product of extrinsic factors that increase the probability of detection or make more difficult the accomplishment of the criminal purpose or because of unanticipated difficulties in carrying out the criminal plan at the precise time and place intended.

. . . .

[W]e agree with the State that the addition of Paragraph Three to the standard language of Pattern Instruction 10.17 was necessary to fully inform the jury as to the meaning of the word "voluntary." Where it is necessary to eliminate an ambiguity found in a certain rule of law or legal term of art, trial courts may properly use extracts from appellate court opinions in order to supplement the pattern jury instruction.

836 N.E.2d at 493-94.



**Instruction No. 10.19 Accident.**

This instruction has been withdrawn.

*(Text continued on page 10-31)*

**Comments**

The "accident" instruction formerly appearing here has been withdrawn.

In reviewing this instruction and considering the "accident" "defense," the Committee could not conceive of a situation in which the principles incorporated in an instruction on "accident" would not also be conveyed to the jury by the standard pattern charges on the elements of the crime, the State's burden to prove, etc..

The Committee also noted that the "accident" instruction appearing in prior versions of this work was taken from *Gunn v. State*, 174 Ind. App. 26, 365 N.E.2d 1234 (1977), which reviewed a conviction for a 1973 homicide and accordingly did not apply the current Indiana Penal Code as revised in 1976. A number of decisions applying the present penal code and addressing "accident" instruction issues have not considered whether "accident" instructions are appropriate and, if so, how they ought to be worded. See, e.g., *Wrinkles v. State*, 690 N.E.2d 1156 (Ind. 1977) (as State did not contest whether tendered "accident" instruction "stated the law," Indiana Supreme Court did not address the issue).

Recently, in an opinion later vacated by a grant of transfer to the Indiana Supreme Court, the Court of Appeals affirmed a refusal to give the former "accident" Pattern Instruction 10.19 in a criminal recklessness trial. *Springer v. State*, 779 N.E.2d 555, 562-63 (Ind. Ct. App. 2002), *transfer granted*, 792 N.E.2d 39 (Ind. 2003). The Court of Appeals' opinion assessed this Comment and concluded that the former instruction could have been confusing in Springer's case. The Court of Appeals did not rule out the possibility that "in the future a situation may be presented in which an accident instruction would be appropriate." The Indiana Supreme Court adopted the opinion of the Court of Appeals' reasoning that "were the jury to decide that the shooting was a result of an accident, there is no question that the jury could not find that he was reckless." *Springer v. State*, No. 31S01-0302-CR-89, — N.E. — (Ind., Nov. 6, 2003).



**Instruction No. 10.21. Alibi.****I.C. 35-36-4-1.**

This instruction has been withdrawn.

**Comments**

The "alibi" instruction formerly appearing here has been withdrawn.

In reviewing the former instruction and considering the "alibi" defense, the Committee concluded that by far the most important aspect of "alibi" is the effect it may have in some cases of narrowing the time frame in which the State must prove the defendant committed the crime. This narrowing effect does not necessarily occur whenever the defendant files a notice of alibi, but in cases where it does the State must prove the defendant was present at the time and place in its answer to defendant's alibi notice:

. . . [T]he mere fact that a defendant raises an alibi defense does not necessarily make time an essential element of an offense. However, where the State's answer to the notice of alibi and evidence points exclusively to a specific date, and the defendant presents a defense based on that date, the jury's consideration of the defendant's guilt should be restricted to that date.

*Sangslund v. State*, 715 N.E.2d 875, 878-79 (Ind. Ct. App. 1999), *transfer denied* 726 N.E.2d 309 (Ind. 1999).

If a conventional "alibi" instruction is requested and the judge decides one ought to be given, the Committee suggests that the term "alibi" not be used, first to avoid having to define it and second because it may have a negative connotation for the jury. The Committee also recommends that the instruction not use the term "defense," because "alibi" is not an affirmative defense. Instead, "alibi" consists of evidence on defendant's presence at the crime, an essential element the State has to prove beyond a reasonable doubt. If an instruction on this topic is appropriate, the Committee suggests the following language:

You have heard evidence that at the time of the crime charged the Defendant was at a different place so remote or distant [or that such circumstances existed] that he could not have committed the crime. The State must prove beyond a reasonable doubt the Defendant's presence at the time and place of the crime.



**Instruction No. 10.23. Necessity.**

The defense of necessity is an issue in this case.

The defense of necessity applies when:

- (1) the act charged as criminal was the result of an emergency and was done to prevent a significant harm;
- (2) there was no adequate alternative to the commission of the act;
- (3) the harm caused by the act was not disproportionate to the harm avoided;
- (4) the Defendant had a good-faith belief that his/her act was necessary to prevent greater harm;
- (5) the Defendant's belief was objectively reasonable under all the circumstances of the case; and
- (6) the Defendant did not substantially contribute to the creation of the emergency.

The State has the burden to prove beyond a reasonable doubt that the Defendant was not acting out of necessity, and may do so by disproving any one of the above facts.

**Comments**

Necessity is a common law defense. *Toops v. State*, 643 N.E.2d 387 (Ind. Ct. App. 1994).

"In order to negate a claim of necessity, the State must disprove at least one element of the defense beyond a reasonable doubt." *Dozier v. State*, 709 N.E.2d 27, 29 (Ind. Ct. App. 1999).



Washington, D.C. 20535

TO: DIRECTOR, FBI (100-441100) FROM: SAC, NEW YORK (100-100000)

RE: JAMES EARL RAY, AKA; ALLEGED ATTEMPT TO OBTAIN PASSPORT FOR TRAVEL TO AFRICA; ALLEGED ATTEMPT TO OBTAIN PASSPORT FOR TRAVEL TO AFRICA; ALLEGED ATTEMPT TO OBTAIN PASSPORT FOR TRAVEL TO AFRICA.

On 10/10/68, NEW YORK ADVISED THAT JAMES EARL RAY, AKA, ALLEGED ATTEMPT TO OBTAIN PASSPORT FOR TRAVEL TO AFRICA; ALLEGED ATTEMPT TO OBTAIN PASSPORT FOR TRAVEL TO AFRICA; ALLEGED ATTEMPT TO OBTAIN PASSPORT FOR TRAVEL TO AFRICA.

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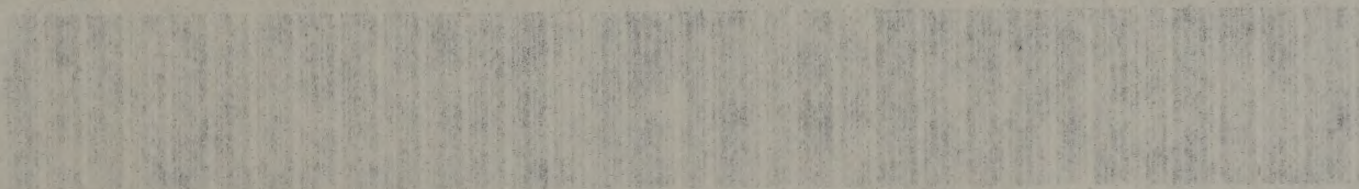
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